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ABSTRACT

The intent of the Immigration Reform and Control Act (IRCA) of 1986 to eliminate the large exploitable subclass of undocumented immigrants living within the borders of the United States cannot be achieved through the methods chosen for its implementation. IRCA was designed to legalize the status of undocumented immigrants and to prevent more immigrants from entering the country illegally. The legalization program comprised a two-stage process for undocumented immigrants to become legal citizens. The employer sanctions program required employers to verify the documents of all new employees and established penalties for hiring undocumented workers. The first stage of legalization failed to maximize participation by eligible applicants. Many who completed the first stage of legalization may lose their legal status because of implementation problems with the second stage of the program. Furthermore, the benefits of legalization did not always apply to family members, who continue to face deportation. Efforts to educate employers about employer sanctions are yielding unimpressive results, and sanctions seem to have had little long-term effect on apprehensions at the United States-Mexican border. Labor market studies show that IRCA has had no significant effect on the job market for undocumented workers and has resulted in widespread employment discrimination against Hispanic and other Americans. The following recommendations are made: (1) complete the legalization program; (2) adopt new policies to eliminate the undocumented immigrant subclass; (3) repeal employer sanctions and develop alternatives for controlling illegal immigration that do not infringe on citizens' civil rights; and (4) reject proposals to develop any type of national identity card. Statistical data are presented in 10 graphs and 2 tables. A list of 94 endnotes is appended. (FMW)

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THE NATIONAL COUNCIL OF LA RAZA (NCLR)

The National Council of La Raza (NCLR), one of the largest national Hispanic organizations, exists to improve life opportunities for the more than 20 million Americans of Hispanic descent. In addition to its Washington, D.C. headquarters, NCLR maintains field offices in Los Angeles, California, Phoenix, Arizona, Chicago, Illinois, and McAllen, Texas. NCLR has four missions: applied research, policy analysis, and advocacy on behalf of all Hispanic Americans; technical assistance and capacity-building support to Hispanic community-based organizations, Hispanic entrepreneurs and elected and appointed officials in communities with large Hispanic populations; public information activities designed to inform Hispanic communities and the broader American public about Hispanic status, needs, and concerns; and special catalytic and international projects. NCLR acts as an umbrella for more than 120 affiliated Hispanic community-based organizations which together serve 32 states, the District of Columbia, and Puerto Rico, and reach more than one million Hispanics annually.

NCLR
NATIONAL COUNCIL OF LA RAZA

UNFINISHED BUSINESS:

THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

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PREFACE

The reopening of Ellis Island has once again focused the attention of the United States on the curious paradox of our immigrant heritage: When contemplating immigration the nation manages both to venerate its immigrant ancestry and at the same time display unease -- even alarm -- about the immigrants arriving on our shores today. The history of immigration policy is really a history of this ambivalence; each group of newcomers has been greeted with uncertainty, fear, and even exclusionary laws. American apprehensions about the negative effects of the latest group of immigrants are never realized; yet as the next wave enters, the very same phrases are uttered again in opposition to the latest group of newcomers. Immigration debates tend to have the same features no matter which ethnic groups or political players are involved: they make strong symbolic statements about the nation's heritage and its vision of the future; they frequently strike nerves of ethnic pride and xenophobia; and, not surprisingly, they are often intensely emotional.

The debate which led to the enactment of the Immigration Reform and Control Act of 1986 (IRCA) reflected this historical experience, exhibiting all of the intensity which a question of national identity deserves. For Hispanic Americans, who represent both the first and the most recent immigrants to the United States, the debate over IRCA represented a watershed, a test of the nation's acceptance of the most recent Hispanic immigrants, as well as its commitment to the rights of all Hispanic Americans. Because the U.S. has a lengthy border with Latin America, immigration policy plays an important role in our lives; it affects our ability to reunite with our families, to visit family members abroad, and -- because Hispanic Americans are often confused for illegal immigrants -- it affects our ability to live in peace in the U.S. Though Hispanics can and sometimes do benefit from changes in immigration laws, our experience with immigration policy also shows that we are just as often its targets.

Because immigration policy affects the lives of all Hispanic Americans -- including Puerto Ricans, who are U.S. citizens by birth, and other Hispanics whose families have lived for centuries in what is now the U.S. -- the National Council of La Raza took a profound interest in the policy proposals which eventually became IRCA. NCLR worked for years to shape legislation which could control illegal immigration without infringing on Hispanic rights, and which would bring the sizeable undocumented population living within the U.S. out of the shadows. The principles which guided NCLR during the debate over enactment of the law also guided our work on its implementation, and they are the foundation of this analysis of IRCA's effects.

NCLR believes that the nation is harmed by the presence of a large undocumented community living underground within its borders. The existence of such a subclass not only exposes the immigrants themselves to exploitation, but also threatens the wages and working conditions of all U.S. workers. For this reason, NCLR supported the legalization program

when the legislation was being considered, and worked to maximize participation of the undocumented community when it was enacted.

However, legalization was not sufficient to induce NCLR to support IRCA when it finally passed the Congress. While we agree that the U.S. can and should control its borders, we have always disagreed that employer sanctions would reduce or eliminate undocumented immigration. Worse, our experience indicated to NCLR that employer sanctions would infringe on the civil rights of Hispanic, Asian, and other "foreign looking" Americans. This was verified by the behavior of employers in response to the news coverage of IRCA even before it passed; the very debate inspired discrimination. No matter what the benefits of a new law, the values of this country dictate that it is unconscionable to enact public policies which infringe upon the civil rights of Americans.

In retrospect, we take no pleasure at having been right about employer sanctions. For the first time in recent memory, the U.S. has a law on its books which causes widespread, systematic discrimination against a large group of Americans. This is a step backwards for any society committed to equal opportunity. Moreover, it is becoming increasingly clear that the policy has done little, if anything, to control illegal immigration.

The United States faced a great challenge during the years in which IRCA was crafted, debated, and voted into law; that challenge is still before us. The symptoms which led to the enactment of IRCA in the early 1980s are still with us as the U.S. enters the next decade. Illegal immigration persists, and there are clear signs that large numbers of undocumented immigrants continue to live within our borders at the mercy of those who exploit them. If the experience with IRCA teaches us anything, it must be that the challenge of crafting effective and humane immigration laws has yet to be met.

Dozens of government entities, researchers and advocates have studied IRCA since its enactment in 1986. Few have attempted to address the issue of whether IRCA has achieved its fundamental objectives; even fewer have assessed this sweeping legislation from the standpoint of the community it most affects. I hope this report addresses both of these gaps, and helps policy makers and the public to understand the scope of the challenges -- and the types of public policies needed to resolve -- IRCA's "unfinished business."

Raul Yzaguirre
President & CEO
National Council of
La Raza

EXECUTIVE SUMMARY

The Immigration Reform and Control Act of 1986 (IRCA), the first major immigration legislation in 21 years, was designed to meet two very different goals: to legalize the status of the sizeable undocumented immigrant community which had grown within the United States, and to prevent more such immigrants from entering illegally. One of the law's major new programs, legalization, offered an historic opportunity for undocumented residents of the U.S. to "come out of the shadows" and become legal U.S. residents. The second, employer sanctions, required employers to verify the documents of all new employees, and established penalties for the hiring of undocumented workers, an effort to eliminate the job market for this "underground" labor force.

Four years after its enactment, the moment has arrived to evaluate the effects of IRCA in relation to the goals it was intended to achieve. Clearly, IRCA is unfinished business. Though the law's two major programs have had major effects on the U.S. and on the immigrant community, IRCA's fundamental purpose has not been achieved. In fact, there are substantial reasons to doubt that its intent can ever be achieved through the method chosen by Congress.

LEGALIZATION

The legalization program consisted of a two-stage process. The first stage, for which there was a 12-month application period, provided temporary status for undocumented immigrants who could prove they were in the U.S. since before 1982, and who fulfilled a host of other requirements. The second stage, which is currently underway, contains additional requirements and application deadlines. If applicants fail to complete both stages, they revert back to undocumented status.

While the legalization program ultimately helped nearly 1.7 million previously undocumented persons change their status, the first stage of legalization failed to maximize participation from the pool of eligible applicants. A number of implementation problems, including a flawed public information campaign, frequent changes in the regulations governing eligibility, and concerns for family unity limited the number of eligible immigrants who ultimately applied for legalization. In addition to the limitations in the implementation of legalization, the fact that Congress limited eligibility for legalization to immigrants who had been in the country before 1982 also limited the success of the program. Many undocumented residents of the U.S were simply ineligible to legalize.

Many who successfully completed the first stage of legalization may lose their legal status because of implementation problems with the second stage of the program. Though little publicized, the second stage of legalization is vital to the success of the program; however, severe implementation problems may result in large numbers of

immigrants losing their newly acquired legal status. Funding for English/civics classes which are vital to the second stage is being cut by Congress, and confusion over complicated application deadlines is needlessly jeopardizing the status of many newly legalized immigrants. Until Congress acted recently to extend the second stage deadline by one year, 35,000 legalized persons had already lost their status because of problems with second-stage implementation. Unless implementation of the second stage is improved, many of the newly legalized could lose their status by the end of the program.

While legalization benefitted many individuals, the benefits did not always apply to their families; many of the families of newly legalized immigrants continue to face separation by deportation. Despite an INS "family fairness" policy, many spouses and children of newly legalized immigrants continue to be pursued by the INS. Children as young as three years old have been placed under deportation proceedings. Even families who are eligible for protection have been separated by the INS. This violates one of the basic underlying principles of U.S. immigration law and policy, family unification.

As a result of these problems, the overall goal of legalization -- to eliminate the exploitable subclass of undocumented U.S. residents -- has not been achieved. Even if the maximum possible number of newly legalized persons safely reach permanent residence status, the U.S. will be left with a large undocumented population which did not legalize, or which arrived after IRCA was enacted. NCLR estimates that the size of the undocumented population today, perhaps three to four million persons, equals that of the early 1980s, when the debate over IRCA took place. Conditions for these people may be worse than at the beginning of the decade, when the arguments that legalization was not only humane, but in the national interest, were framed. In the wake of this "one-time-only" program, the nation appears to be left with at least as many undocumented people as when it first considered these proposals.

EMPLOYER SANCTIONS

Employer sanctions were intended to eliminate the job market for undocumented workers by making it illegal, for the first time, for employers to hire such workers. The law requires employers to fill out a form (I-9) verifying that they have checked the documents of all new employees. The ability of the law to be effective depends on employers understanding of their responsibilities under the law, and their willingness to comply with its requirements.

In response to concerns raised by Hispanic and other civil rights groups that employer sanctions would cause discrimination, IRCA also contained anti-discrimination protections, and established an office within the Department of Justice to enforce them. The law also provided for the U.S. General Accounting Office to conduct a series of studies to determine if employer sanctions did, indeed, cause discrimination.

Efforts to educate employers about employer sanctions are yielding unimpressive results. Despite an INS education effort which more than doubled in intensity from 1987 to 1990, employers understand the law less now than they did in 1988. In addition, enforcement of employer sanctions has been uneven and inconsistent.

Employer sanctions appear to have had little if any long-term effect on apprehensions at the U.S.-Mexico border. Despite a decline in border apprehensions immediately after enactment of IRCA, border crossings are currently on the rise. The post-IRCA effect on border apprehensions never reduced activity at the border to a point below its levels in 1982, when the debate over IRCA was raging. Border apprehensions are currently rising rapidly, matching peak 1986 levels in some areas.

Labor market studies show that IRCA has had no significant effect on the job market for undocumented workers. There is growing evidence that a substantial body of employers continue to attract and employ unauthorized workers, often in conditions worse than those which preceded IRCA's enactment. Though employer sanctions were intended, at least in part, to protect undocumented workers from exploitation, the existence of the policy makes it easier for employers to reduce wages and subject unauthorized employees to poor working conditions. Sweatshops are reported to be resurging, and day labor pools, which offer few labor law controls, are thriving in many parts of the U.S., as a direct result of employer sanctions. Because of employer sanctions, exploited workers are now less likely to report abuse than they were prior to the law's enactment.

Employer sanctions appear unlikely ever to achieve their intended purpose. Experience with enforcement of employer sanctions during its first four years -- a period in which the intensity of education and enforcement was likely to be at its highest -- suggests that the goals of the policy are not only unachieved, but perhaps unachievable. It appears unlikely that even increased efforts could lead to effective reduction or elimination of the job market for undocumented workers.

Employer sanctions are inherently discriminatory. A number of studies, culminating in a 1990 GAO report, indicate that employer sanctions have resulted in widespread employment discrimination against Hispanics and other Americans. The GAO reports that 19% of employers admit to adopting discriminatory hiring policies as a result of the law. IRCA-generated discrimination appears to be the most concentrated in areas of the U.S. with the largest numbers of Hispanics and Asians, amounting to a civil rights disaster for large numbers of U.S. citizens and legal residents. Even if sanctions were working, the history and values of the United States dictate that no public policy objective justifies a discriminatory law.

RECOMMENDATIONS

1. Legalization

The U.S. should complete the legalization program. Legalization will not be finished until the second stage of the program has been completed. Congress, the INS, and immigrant service agencies have an obligation to maximize the final number of persons who become permanent residents. Several important policy changes would increase the number of persons eligible to legalize who actually attain legal status. These include: allowing extensions of the stage-one application period for those applicants who were misinformed of changes in the regulations and who have become part of class-action lawsuits; conducting vigorous outreach for the second stage of legalization; leaving SLIAG funds in place to provide for ESL/civics classes which assist applicants in fulfilling second stage requirements; and ensuring that "family unity" programs are implemented as generously as possible to prevent the deportations of the spouses and children of newly legalized immigrants.

Congress should adopt policies to eliminate the undocumented subclass living within the United States. The existence of an undocumented population of three to four million, under conditions which are probably worse than they were prior to IRCA, is as harmful to U.S. society today as it was when IRCA was first framed. Congress must therefore consider mechanisms for adjusting the status of undocumented residents of the U.S. by a means more effective than the recent legalization program. Such means could include a program which legalizes individuals living within the U.S. when IRCA was passed, or a second legalization program with a cutoff date that falls within one year of enactment.

2. Employer Sanctions

Congress should repeal employer sanctions. No public policy objective justifies creating discrimination against U.S. citizens and others lawfully authorized to work in the United States. Congress therefore has a moral obligation to repeal employer sanctions. Pending repeal of the policy, Congress should enact legislation which minimizes the discriminatory effects of employer sanctions. Such legislation should reduce the documentation burden on employers, and amend recently adopted anti-discrimination measures with legislation which requires that the effects of these measures be monitored. If the results of such monitoring show that anti-discrimination protections have failed to eliminate IRCA-generated discrimination, such results should trigger an automatic sunset of employer sanctions. A "true" sunset provision increases the incentive for Congress and the Administration to enforce IRCA-related civil rights protections vigorously, and guarantees that the issue be revisited if such measures do not work.

Congress and the Administration should develop alternatives to employer sanctions which would be more likely to be effective at controlling illegal immigration without infringing on the civil rights of Hispanic and other Americans. Such a policy should include: increasing border enforcement and accountability of the Border Patrol; increasing enforcement of existing labor laws, thereby "targeting" employer who continue to hire and exploit undocumented workers; and increasing penalties for harboring and smuggling illegal immigrants.

Congress should reject proposals to develop any type of identity card. It is not clear that any new type of identification system, whether it be a new card or an "improved" social security card, would reduce discrimination. Implementation of a new form of identification may cause more problems than it resolves. Congress should not consider expensive, cumbersome new policies to remedy the negative effects of a federal law. Discrimination under IRCA should be addressed at its source -- the structure and implementation of employer sanctions.

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I. INTRODUCTION

Major changes in U.S. immigration policy tend to occur just once in a generation; in this century, reform legislation has been enacted in 1921, 1952, 1965, and 1986. All the major immigration debates have had certain common features, though the political players and affected ethnic groups have changed; they have all made strong symbolic statements about the nation's heritage and its vision of the future; they have struck nerves of ethnic pride and xenophobia; and, as the debate over IRCA demonstrates, they have evoked intense emotion. The Immigration Reform and Control Act of 1986 (IRCA), however, has a unique place within the development of immigration policy, because it is the first major legislation to grapple with the phenomenon of illegal immigration.

IRCA was the product of a number of circumstances which began to take shape in the 1970s. During this decade, the number of Border Patrol apprehensions of undocumented aliens -- particularly Hispanics -- more than doubled, abuse of undocumented persons in the workplace began to make headlines, and Hispanics in general became more visible because of demographic growth and an expanding civil rights movement. Estimates of the number of undocumented persons within U.S. borders in the 1970s, including border crossers from Mexico and individuals from other countries who entered the U.S. with a visa and stayed beyond their visa expiration date, ranged from one to 12 million. The media rhetoric referring to the undocumented ranged from "rising tide" to "tidal wave" to "menace." When large influxes of refugees - particularly from Cuba and Haiti - ushered in the 1980s, it became increasingly obvious that the Immigration and Naturalization Service (INS) was not equipped to cope with rapidly mounting pressure on the system it is required by law to implement.

Beginning with the Ford administration, several government task forces were appointed to address the question of illegal immigration. Most notably, the Select Commission on Immigration and Refugee Policy, known as the "Select Commission," was established in 1978 and published a lengthy set of recommendations in 1981. The Select Commission's final report provided the framework for the philosophy of IRCA:

> We recommend closing the back door to undocumented/illegal migration, [and] opening the front door a little more to accommodate legal migration in the interests of this country....[1]

The method for closing the "back door" proposed by the Select Commission and ultimately enacted by Congress was to eliminate the "pull" factor attracting undocumented immigrants into the country. The theory is relatively simple: as long as there are jobs, people will cross the borders in order to work. Eliminate the jobs, and presumably they will stop coming. IRCA, therefore, imposed penalties on employers who hire, recruit or refer undocumented workers, and required employers to document the immigration status of all new employees.

Both the Select Commission and Congress recognized that a substantial number of undocumented immigrants were already living in the United States, and had been here for many years. The second major provision of IRCA attempted to recognize the presence of these illegal residents, and provide a humane method for bringing some of them out of the "shadows" of our society. According to the Select Commission Final Report,

> The costs to society of permitting a large group of persons to live in illegal, second-class status are enormous. Society is harmed every time an undocumented alien is afraid to testify as a witness in a legal proceeding (which occurs even when he/she is the victim), to report an illness that may constitute a public health hazard or disclose a violation of U.S. labor laws.[2]

This second proposal became the legalization program, or "amnesty," which provided an opportunity for undocumented persons who could prove that they had been in the United States before January 1, 1982 and fulfill a host of other requirements, to begin the process of becoming permanent residents of the United States.

Four years after its enactment, IRCA continues to stimulate debate. Its two major elements, legalization and employer sanctions, plus a third major unintended effect of the law, the creation of new forms of discrimination, are at best yielding a mixed picture of the law's effectiveness. In light of the events of the last two decades which inspired IRCA, the critical questions remain: Has Congress achieved what it intended? And at what cost?

II. LEGALIZATION

A. Overview

Congress designed legalization to eliminate the large exploitable subclass of undocumented persons living within the U.S. Both Congress and the Select Commission recognized the dangers of such a subclass:

> The United States has a large undocumented alien population living and working within its borders....They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars. However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill. Continuing to ignore this situation is harmful to both the United States and the aliens themselves.[3]

Legalization was designed as a two-phase program, through which applicants had to qualify to become first temporary, then permanent, residents.* The official "opening day" of the 12-month application period for the first stage of legalization was May 5, 1987, six months after IRCA was signed into law. In order to apply, the undocumented resident needed to complete the proper application materials indicating illegal residence in the U.S. since before 1982, and supplement it with documentation proving identity, residence, and financial responsibility. The applicant was also required to supply fingerprints, photos, and the results of a medical examination.

Some details of the program, such as the basic eligibility criteria and the length of the application period for the first phase, were specified in the statute. However, the fine tuning of the program was left to the INS, which issued regulations outlining the details of how the program would work, who exactly would qualify, and how much it would cost.

The statute also created a role for community agencies in the legalization process. Local voluntary agencies could become "Qualified Designated Entities" (QDEs), to serve as a "buffer" between the feared INS and the undocumented immigrant community. Congress contemplated a role for QDEs that included processing actual applications, and working with the INS on its outreach campaign. As the legalization program developed, the QDEs

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* The legalization process also included a separate program for Seasonal Agricultural Workers (SAWs). The SAW program differed greatly from the "general" legalization program in terms of eligibility, nature of the population which qualified, and application procedures. Because the SAW program was designed for agricultural workers, and not the population of long-time undocumented U.S. residents, NCLR has chosen to focus this paper on the "general" legalization program.

supplemented their roles as "buffers" between the undocumented community and the INS by monitoring INS implementation of its regulations and advocating for the most generous program possible.

In the four years since enactment of IRCA, a number of studies have been published charting the progress of the legalization program. Though these assessments note difficulties experienced by the INS and by community groups which were involved in implementing legalization, they conclude that the program was effective. There is general consensus among students of legalization that, despite serious implementation problems, the overall number of applicants (1.7 million), the high approval rate (around 95%), and the mid-program refinements made by the INS all indicate that the first stage of legalization was a success.[4]

However, legalization's basic purpose was to realize the policy objective of eliminating the undocumented subclass by granting legal status to undocumented U.S. residents. Therefore, the standard by which legalization should be evaluated is not the overall number of persons legalized, but rather the size of the undocumented subclass which remains.

In the final analysis, serious flaws hindered the implementation of legalization. Problems with regulations, public information, and family unity issues diminished the number of eligible persons who ultimately applied. Other deficiencies in the design of legalization limited the proportion of the undocumented population who were eligible for legalization. The following section examines these difficulties, outlines the areas in which legalization is still very much unfinished business, and concludes with estimates of the number of undocumented persons who were left behind by legalization.

B. Implementation

1. Regulations

Congress offered some specific guidelines on how legalization should be implemented. The legislative history confirms the common sense notion that, in order to be effective, a legalization program would have to maximize participation of the eligible population. Otherwise, the program would leave too many undocumented persons within U.S. borders, and would fail to achieve its intended goals.

The Senate Judiciary Committee urged that legalization be "comprehensive,"[5] and Immigration Subcommittee Chairman Edward Kennedy (D-MA) urged that the statute be interpreted "flexibly."[6] The House Judiciary Committee similarly recommended that legalization be implemented in "a liberal and generous fashion."[7] Specific members of Congress also urged "understanding and generosity" in the implementation of legalization.[8]

While IRCA's statutory language laid out the general eligibility criteria for legalization,* the specific standards applicants were required to meet were found in the INS regulations governing the program, accompanying memoranda, and "wires" sent to field offices from the INS Central Office. The INS implemented an unprecedented and widely praised consultation process in developing its regulations for the program.[9] Nevertheless, there was widespread criticism that the regulations were too restrictive, given Congressional intent to devise a generous program.

A wide range of religious, ethnic, labor, and other organizations, including the United States Catholic Conference, the International Ladies Garment Workers Union, the National Council of La Raza (NCLR) and the American Immigration Lawyers Association, argued that the regulations defied Congressional intent.[10] The first round of regulations were perhaps best characterized by the prestigious Washington, D.C. law firm, Hogan & Hartson, which stated that "in neither tone nor content do the Proposed Regulations reflect and carry out... [Congress's intent for a generous program]."[11] Key members of Congress, including Speaker Jim Wright (D-TX), House Judiciary Chairman Peter Rodino (D-NJ), House Immigration Subcommittee Chairman Romano Mazzoli (D-KY), and Senate Immigration Subcommittee Chairman Kennedy stressed to the INS, the Justice Department, and the President that generous implementation was vital to the success of legalization.[12]

During the 12 months of the first stage of legalization, the INS made over 15 major changes in regulations, virtually all of which increased eligibility for legalization (See Figure 1). The regulatory changes resulted from a combination of pressure on the INS by advocacy groups and litigation. News coverage of the initial days of the legalization program depicts heavy pressure from immigrant service agencies against an INS which denied that changes were needed to make the program work.[13] The minutes of the meetings held between the INS and the National Coordinating Agencies (NCAs, the national organizations whose networks included most of the major immigrant service groups) reflect prolonged discussion over major regulatory issues, including the definition of felony and misdemeanor for purposes of legalization, the continuous residence requirement, the eligibility of asylum applicants, the

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* According to the statute, in order to qualify for legalization, applicants needed to prove that they:

1. Had entered the United States before January 1, 1982, and had continuously resided in the U.S., except for "brief and casual" absences, since that time;

2. Were able to support themselves without excessive use of public assistance; and

3. Were otherwise admissible as immigrants, i.e., applicants must not have been convicted of a felony or three or more misdemeanors, nor be otherwise subject to exclusion under existing law.

definition of "public charge," foster care, and other issues.[14] Litigation also accounts for major policy changes on the "known to the government" issue, absences from the U.S., the 30-day filing requirement for those apprehended by INS after November 6, 1986, visa fraud, administration of the public charge exclusion, and a host of other key regulatory issues.[15]

FIGURE 1*
REGULATORY POLICY SUMMARY

ISSUES	DATE	REGULATORY ISSUES
1. Texas DWI (driving while intoxicated) cases - accept despite felony classification	June 16	This cleared up confusion in Texas, where DWI is considered a felony; without this change, persons in other states would have been eligible while Texans would not because of differences in State law
2. Stateside criteria cases - departure from U.S. does not interrupt continuous residency	July 14	Partially clarified what kinds of departures from the U.S. would violate the continuous residency requirement
3. Foreign students with Duration of Status (D/S) - eligible if study completed before 1/1/82	July 14	Clarified at what point students who had overstayed their visas are considered "illegally in the U.S.;" legalization required that the applicant be in illegal status before 1/1/82
4. Waivers - clarification of humanitarian, family unity, public interest grounds	Aug. 6	The statute allowed waivers for humanitarian, family unity, and public interest reasons; some definition of these terms provided by the INS
5. HIV testing - announcement of requirements as of 12/1/87	Aug. 8	In separate legislation, Congress required all immigrants to be tested for the HIV virus. This change clarified the requirement for legislation applicants
6. Asylum applicants - eligible if filed before 1/1/82	Aug. 19	Clarified the eligibility of asylum applicants, who, by virtue of petitioning for asylum, could have been considered something other than "illegal" immigrants, thus making them ineligible to legalize
7. Diplomatic and international organization visa holders (A&G visas) - eligible if employment ceased before 1/1/89	Aug. 25	Clarified at what point persons who overstayed this type of visa became "illegal"

* Columns one and two from Meissner and Papademetriou, The Legalization Countdown: A Third Quarter Assessment, February 1988, pp. 25 - 26, reprinted with permission from the Carnegie Endowment for International Peace.

FIGURE 1, CONT.

ISSUES	DATE	REGULATORY ISSUES
8. Felony - treated as misdemeanor where state so defines and sentence is less than 1 year (resolves #1 above)	Sept. 8	Further clarified the difference between a felony and misdemeanor
9. Public charge - clarifies standards, public cash assistance	Sept. 20	Provided some clarification of what factors would be considered in making the determination of whether an applicant was "likely to become a public charge"
10. Known to the Government - court decision overturns regulation. Applies in Dallas district only; government not appealing	Sept 22	The courts overruled an INS regulation regarding those whose visa violations were "known to the government," which would make them eligible for legalization. The INS had narrowly defined "known to the government" as "known to the INS" (particularly important for students who violated their visas by working while they were students - government entities other than the INS would be aware of the violation)
11. Re-entry - eligibility for unlawful non-immigrants who re-entered U. S. with valid visa	*Oct. 8 **Oct. 28	This affected undocumented immigrants who left the U.S. and returned on visitors or other visas. Such visas were obtained fraudulently because the traveller was a resident of the U.S., not a visitor. This regulation determined that use of fraud would not jeopardize the applicant's eligibility
12. Ineligible family members - guidelines for use of Attorney General discretion	*Oct. 21 **Nov. 13	This was the first INS "family fairness" policy for the ineligible children of two legalization applicants
13. Foster care - considered public cash assistance but not sole determinant of public charge	Nov. 10	This clarified somewhat whether being a foster child or whether receiving aid for being a foster parent made an applicant ineligible. Funds for foster parents were deemed "cash assistance," for the purposes of determining whether the applicant was likely to become a public charge
14. HIV testing - instructions to physicians	Nov. 18	Further clarified the new HIV test requirement
15. Interim rule - publication of regulations incorporating policy changes above	Jan. 17	Codified above changes

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* Announced.

** Written instruction to field.

The changes in INS regulations significantly expanded the number of persons who qualified for legalization. During a press conference to announce one regulatory change affecting applicants who had left the U.S. and subsequently re-entered, INS Commissioner Alan Nelson predicted that at least 100,000 additional people would become eligible.[16]

Despite the changes in INS policy which liberalized the program, the initial restrictive position taken by the INS damaged the effectiveness of legalization. Though regulatory changes made thousands of individuals theoretically eligible for legalization, in practice a substantial number of the persons who should have benefitted were not informed of changes in time to apply. At least seven major pending class-action lawsuits involve potential applicants who were made eligible for legalization by changes in INS requirements. Most of these individuals were initially informed correctly that they were ineligible for legalization, and did not find out that the program's requirements had changed until it was too late to apply. The more than 100,0000 people involved in these lawsuits reflect a potentially much larger class of immigrants who "fell through the cracks" because of the restrictive initial regulations by the INS.

2. Public Information

Congress recognized that dealing with a population which had been living in the shadows of society required special effort, to inform them about the program and to address specific concerns within the community about eligibility, confidentiality, safety of family members, and other issues. Congress, therefore, deliberately specified that outreach be a cooperative effort between the INS and QDEs. The House Judiciary Committee report stated that, "...by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward."[17]

Community-level outreach was left largely to the QDEs -- although they received no funding for this purpose -- while the INS awarded a $10 million contract to a California organization called the Justice Group to take on the national outreach campaign. The funds were to be used equally for legalization (directed at the potentially eligible population) and employer sanctions (directed at employers). In the early months of the program the Justice Group -- with minimal input and significant opposition from immigrant service agencies -- chose to concentrate on mass media outreach to the exclusion of alternative approaches. The early media messages focused on increasing public awareness of the existence of the legalization program. They did not, however, address specific concerns which were emerging in the immigrant community, in spite of the fact that changes in the regulations were causing major confusion at the local level. Several surveys conducted during the legalization application period, including one by the Justice Group itself, identified specific issues which were inhibiting potential applicants, such as concerns over confidentiality and ineligible family members -- concerns which were not being addressed in the outreach campaign.[18]

QDEs and other groups, essentially shut out of the outreach program despite the intent of Congress, had advocated from the outset for community-based outreach, focusing on non-traditional dissemination networks including churches, civic and ethnic groups, and service agencies. Based on experience working in the immigrant community, they argued that an approach relying exclusively on the media would not effectively reach the target population. In addition, QDEs urged that the Justice Group gear informational materials to the actual concerns which were keeping immigrants from applying for legalization. Correspondence in August 1987 from the International Ladies Garment Workers Union and other major institutions involved in legalization noted:

> It is our experience that, due to lack of understanding of some of the details of the legalization provisions, potential applicants are deterred from participating. Confidentiality provisions of the Act (especially with reference to family members who are not eligible) should be stressed in the public education campaign.[19]

After the first six months of the legalization program, it had become clear that the public information effort was inadequate. Independent assessments were unanimous in concluding that the campaign was largely ineffective or "seriously flawed," in the words of one major critic.[20] Various reports show that, despite strained resources, community agencies filled the public information vacuum by conducting community forums, developing outreach materials, and working with ethnic media to produce public service announcements.[21] The Catholic church's network alone used its own resources to provide information to more than half a million immigrants in the first three months of the program. Some INS field staff took responsibility for generating additional publicity in their area, a tacit admission that the Justice Group campaign was not sufficiently effective.[22] Six months after the opening of the application period, many reported that the only visible public information by the INS focused on the employer sanctions provisions of IRCA, not on legalization.[23]

During the first half of the program, buoyed by large numbers of applications and amid continuing battles with the QDEs over regulatory and other issues, the INS and the Justice Group ignored requests that the public information strategy be revised. In what some viewed as an apparent attempt to punish QDEs for their advocacy on the regulations, the INS and the Justice Group eliminated all mention of QDEs from public informational materials.[24]

In the last months of the legalization program, with application rates declining and criticism of the public information effort growing, the Justice Group reassessed the focus of its campaign, essentially adopting the strategy long advocated by the QDEs. Advertisements began to feature immigrants who had made it through the program, focusing on the very concerns which the QDEs had identified months before. The result was a much more effective campaign, albeit implemented far too late to achieve its needed impact.

Given the confusion caused by seemingly constant changes in the regulations, community approaches were vital to maximize the number of persons who benefitted from

legalization. Failure to adopt these approaches until late in the program had a dramatic negative effect on the legalization program.[25] The legislative battle to extend the application period, which was narrowly defeated in Congress a few days before the end of the program, reflected widespread concern that failure to implement an effective public education campaign had limited the success of legalization by reducing the number of individuals whose fears or misunderstanding were overcome in time to file applications.

3. Family Unity

Of the many issues raised by the legalization program, the question of "family unity" was perhaps the most controversial and damaging to the overall effectiveness of the program. Despite a confidentiality provision which guaranteed that no information on a legalization application would be used by the INS for any other purpose, many potential applicants feared listing the names and addresses of family members, including spouses, children, and siblings whom they knew were ineligible for legalization themselves. Because it is extremely common for immigrant families to arrive in their new country in shifts, with some family members preceding others by as much as several years, many potential legalization applicants had family members who were ineligible. A survey of over 700 undocumented people conducted by the Justice Group in October 1987 found that as many as 25% of those eligible for legalization had not applied for fear of exposing family members to deportation.[26]

A second, related concern was that, even in families where the eligible individual decided to apply, there was no guarantee that the family would not be separated if the INS later apprehended the undocumented family members. Service agencies reported hearing this concern consistently from the immigrant community, and it was reflected in widespread press coverage when the INS began to initiate deportation proceedings against some family members of newly legalized persons.[27]

In the fall of 1987 several "family unity" proposals emerged in Congress to legalize the family members of persons who were themselves eligible for legalization.[28] The INS opposed these proposals, instead announcing its first administrative attempt at addressing the problem, which it called a "family fairness" program. An attempt to quell fears in the community and encourage people to apply, "family fairness" was portrayed as a far more generous proposal than it actually was; the policy guaranteed protection against deportation only to children who had two legalized parents. Authority to implement the "family fairness" program was left to the individual district offices of the INS -- and many districts chose not to implement it at all. Worse, in some districts, applicants who were turned down after applying for "family fairness" were placed under deportation proceedings.

In February 1990, after significant pressure from immigrant service agencies, with "family unity" legislation having passed the Senate and pending in the House, INS Commissioner Gene McNary announced a new family fairness program.[29] Citing

inconsistencies in the old policy, the INS began implementing the new program on February 14, offering work authorization and protection against deportation for spouses and minor children of newly legalized persons provided they can show they were in the country on November 6, 1986, the date of IRCA's enactment.[30] The policy has thus far earned praise as an important step for the INS, though immigrant service groups continue to express concerns about some spouses and children of legalized persons who could face deportation because they are ineligible for the relief being offered by the INS.[31] For example, there are several known cases of children as young as three years old who are not eligible for family fairness relief, and are under deportation proceedings despite the fact that their parents are legalized.[32] One mother was recently deported by Border Patrol officials who disregarded her family fairness application -- which the INS had not yet adjudicated -- separating her from her legalized husband and eight children.[33]

4. Role of Community-Based Organizations

As noted above, IRCA specifically authorized the INS to work with immigrant service and community-based organizations in order to provide outreach for the legalization program and to create a "buffer" between the INS and the undocumented community. The statute specified that applicants could file their legalization applications directly with the QDEs, who would then forward them to the INS.

The QDEs, most of them organizations which had worked with immigrants before and had a sense of their concerns about the legalization process, interpreted the statute to mean that their role would necessarily include counseling applicants, helping collect and certify documents, preparing applications, and representing applicants at their INS interviews, in addition to simply providing information, answering questions, and helping immigrants overcome their fear or reluctance to apply.

The formal relationship between the INS and the QDEs took the form of a cooperative agreement. The INS initially offered to reimburse QDEs $15 of the $185 legalization application fee, taking the position that legalization was to be financed entirely through application fees. QDEs believed both that the $185 fee was too high for most applicants, and that a $15 reimbursement simply would not cover their service costs. The INS ultimately permitted QDEs to charge applicants for processing and "ancillary services" over and above the application fee, a solution that the QDEs found troubling, given the already high application fees and the disadvantaged economic status of the applicant pool.

Negotiations over the cooperative agreement were under way when the INS released preliminary regulations, which made it clear that the INS was taking an extremely narrow interpretation of the statute. The QDEs recognized that the more restrictive the regulations, the more difficult the process would be for individual applicants. Restrictive interpretations of the statute meant that the pool of applicants with straightforward cases would be smaller, creating a larger class of people who would require special, individual assistance. QDE

objections to the $15 reimbursement became more aggressive when it became clear that a great deal of work would be necessary to maximize the number of persons who benefitted from legalization.

The NCAs, who represented most of the QDEs nationwide, recognized that legalization would be a "money-loser." As the negotiations over the cooperative agreement provisions showed that the INS was unwilling to change its position, the NCAs considered withdrawing from participation in the program.[34] Ultimately, the QDEs accepted the agreement -- though reluctantly -- because of their commitment to helping people legalize, understanding that they would have to supplement the fees with other revenues simply to break even.

The combination of restrictive regulations, a poorly implemented public information campaign, and a program representing a financial burden to most local agencies, resulted in QDEs whose functions were significantly different than those anticipated by Congress or by the QDEs themselves. During the legalization period and since, QDEs have been criticized for producing far fewer legalization applications than anticipated, and for engaging in "excessive" advocacy with the INS.

The QDE role was indeed different from what was originally contemplated in the statute for two reasons. First, QDEs were not reimbursed adequately for their efforts by the INS; it would have been unreasonable to expect QDEs to process more applications given their financial constraints. Second, QDEs were deliberately undermined by the INS, particularly in the implementation of the public information campaign. Their suggestions for effective outreach were ignored until late in the program, and even the mention of community agencies was omitted from education materials produced by the Justice Group.

These difficulties notwithstanding, the QDEs played an enormously important role in the implementation of the legalization program. QDE advocacy on regulatory issues, along with litigation against the INS, was largely responsible for critical changes in the program which ultimately made hundreds of thousands of individuals eligible for legalization. Similarly, QDEs played an enormous community education role, and in some communities were almost singlehandedly responsible for publicizing mid-course changes in legalization requirements. If the number of applications filed by the groups is the standard by which the QDE role is judged, they understandably fell short of expectations. However, if the standard is their impact on the **overall** number of applicants, the importance of QDEs cannot be dismissed. Aside from those immigrants whose applications were prepared directly by a QDE, hundreds of thousands of applicants received information, counseling, advice, and other assistance from QDEs before filing applications directly with the INS.

Perhaps more importantly, QDE processing and advocacy at local INS offices set the standards by which all legalization applications were ultimately judged by the INS. In the same way that the existence of labor unions establishes certain minimum standards for all workers, QDE advocacy at the national and local levels set INS standards which were applied

to all applicants. Representatives from QDEs -- who often brought copies of INS regulations and policy memoranda to show INS adjudicators who were making decisions on applications -- contributed greatly to consistency and accountability in implementation of the legalization program.

Community education, like the bulk of the services provided by QDEs, was ultimately financed from their own coffers, a considerable financial burden from which most are still recovering. In contrast, the INS appears to have generated a substantial surplus of funds from the legalization program. Though the $185 filing fee was supposed to cover the costs of administering the program, the INS appears to have generated an excess in fees of over $200 million.*

C. *Unfinished Business*

1. Mismanagement

According to the INS, over 1.76 million individuals ultimately applied for legalization. The most recent data available, from May 16, 1990, indicate that by that date the INS had approved 1,610,842 of these applications, and had issued 94,538 denials.[35] At least 5,000 appeals are currently pending on legalization cases.

The following summarizes some of the management problems currently affecting the remaining first-stage applications, providing insight into the sort of implementation difficulties which occurred throughout the program:

- The *Los Angeles Times* reported in 1989 that as many as 20,000 legalization applications in the Western region were "in limbo" because the INS was unable to notify the applicants that they had been approved. Despite INS admonishments that it is the responsibility of the immigrants to notify the INS of address changes, there are widespread reports that change of address cards are not available at INS offices, and that they are not processed efficiently by the INS even when they are properly filed.[36]

- The INS computer system is apparently unable to accommodate some of the procedural problems which occurred in the application process. As a result, the cases which are awaiting more information or for litigation to be resolved have, in at least one major region, been entered into the computer as denials.

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* According to a 1989 analysis by David North and Anna Mary Portz, the INS generated $524 million in legalization fees for the 245A program alone, and spent $279 million. In addition, the SAW program appears to have provided a surplus of about $100 million.

Applicants whose applications are actually still pending are being told that they have been denied, and are losing work authorization. It is possible that these applicants could be "lost" from the system due to confusion on the status of their cases or frustration over bureaucratic mix-ups.[37]

- Advocates are reporting that the INS issued some approval notices for applicants before completing the necessary records checks. Though an approval notice had been sent, many of these applications were subsequently denied without the applicants' knowledge. Because such applicants were not notified of their denials, they may miss the opportunity to appeal within the 30-day time-period. Some individuals have left the country believing they were authorized to do so, only to have their cards confiscated and their status revoked upon their return.[38]

A recent Justice Department audit of the INS confirms that the agency is inefficient and inconsistent in administering its programs, and that such problems plague all elements of INS service delivery.[39] New INS Commissioner Gene McNary has acknowledged publicly that centralization and improved management of the INS are vitally needed, and has indicated his intention to undertake initiatives to begin implementing policies uniformly.[40] It remains to be seen if these initiatives will positively affect completion of the legalization process.

2. Pending Litigation

The INS adopted unreasonably strict requirements at the outset of legalization, prompting a great deal of litigation. A number of lawsuits are still pending. Most of these lawsuits allege that INS regulations or practices unfairly prevented otherwise eligible applicants from applying during the year-long application period. In many cases, the INS has conceded that its regulations or practices were incorrect, but refuses to allow the affected persons to file legalization applications. Because these lawsuits were decided either well into the legalization application period, or after it had ended, the courts have granted extensions of the legalization application period for the classes involved.[41] The INS has taken the position that the court does not have the right to grant extensions of legalization. These cases are currently on appeal, leaving over 100,000 potential applicants in limbo.

3. The Second Stage of Legalization

a. Overview

Though the first stage of the legalization process officially ended in May of 1988 with the closing of the application period, the program is far from over. Legalization was designed to be a two-stage process, with additional hurdles to cross before the newly legalized temporary resident could qualify to become a permanent resident. Part of the

rationale for making legalization a two-stage process was to provide an opportunity for newly legalized persons to learn the basic language skills and knowledge of civics which would assist them in becoming "full members" of U.S. society. The second stage was added to the bill through an amendment offered by Speaker Jim Wright (D-TX), which, among other things, required that temporary residents either pass a test or show that they are successfully pursuing a course of study in English and civics in order to qualify for permanent residence. According to the Speaker,

> ...it [the amendment] would provide the bridge that will dignify the status of the individual. Surely, all of us know that only the most menial jobs characterized by the term 'stoop labor,' only second class jobs are available to one who does not have any familiarity or facility with the language. This amendment will provide the incentive to cross that bridge into full participation.[42]

Applicants for the second stage of legalization must meet this requirement and apply for permanent residence within 42 months of the day they became temporary residents. If they fail to do so, they revert back to undocumented status. Though much less publicized than the first, the second stage is vital to the ultimate success of legalization.

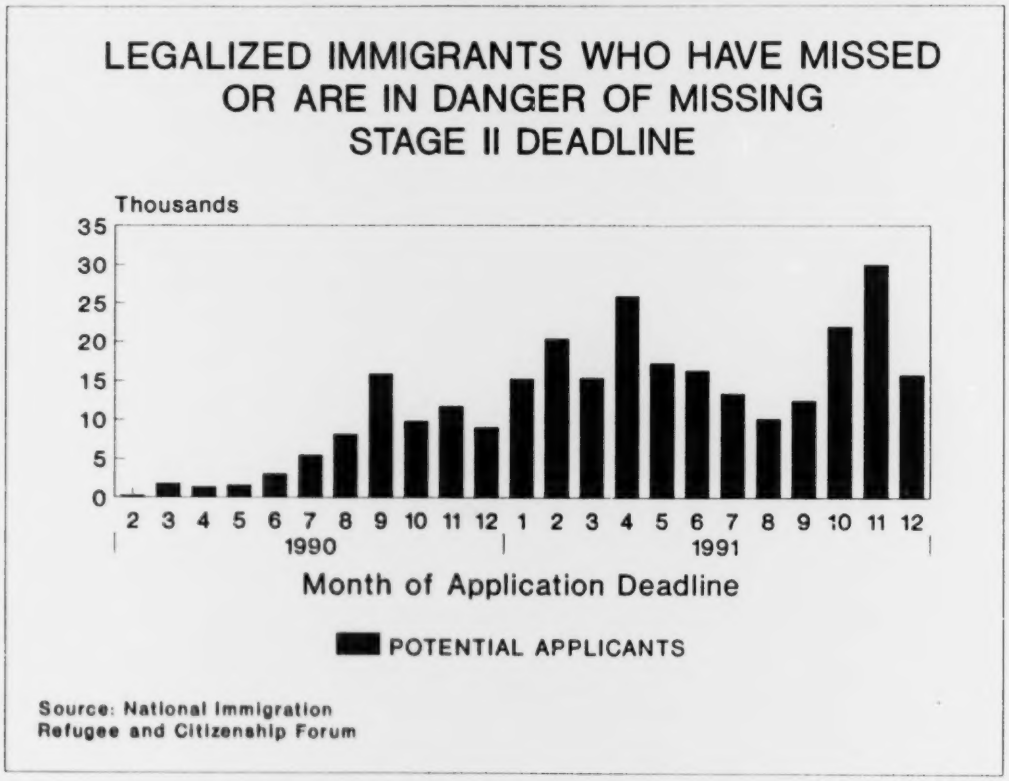
b. The Need for Outreach

Several elements of the second-stage application process have caused concern among immigrant advocacy and service groups. First, immigrant service groups fear that many newly legalized persons do not know that there is a second stage, with new requirements which must be fulfilled in a limited time period. INS outreach for the second stage has consisted of mailing information directly to the newly legalized. In a highly mobile population, the application packets mailed by the INS apparently have not reached everyone who needs them; those who are the most likely to move are also the most likely not to know the details about second stage.

Second, of those who are aware of the second stage, many are confused about their application deadlines. Unlike stage one of legalization, for which there was an identifiable year-long deadline for all applicants, the second stage deadline is individualized. In the original program, each applicant had his/her own deadline, a year-long period which began 18 months after the day they were approved for stage one. Much of the confusion stems from the fact that legalized immigrants have no document which shows the critical approval date; they are forced to calculate their own application deadlines. Attempts by the INS to ease confusion have unfortunately exacerbated the problem. Several would-be second stage applicants have reported getting incorrect information from INS staff which caused them to miss their original deadline.[43] Fortunately, this deadline was extended by one year in the Immigration Action of 1990, in response to evidence that applicants were missing their deadlines.

Figure 2 indicates the number of actual second-stage applicants who had missed or were in danger of missing the second stage deadline before the extension was enacted. Already, over 35,000 persons had lost their status because they missed the application deadline. The first denials of permanent resident status, which render the legalized person subject to deportation, have been reported to immigrant service agencies. Thus, the results of the legalization program are jeopardized by a simple failure to inform temporary residents of the need to file for permanent residence.

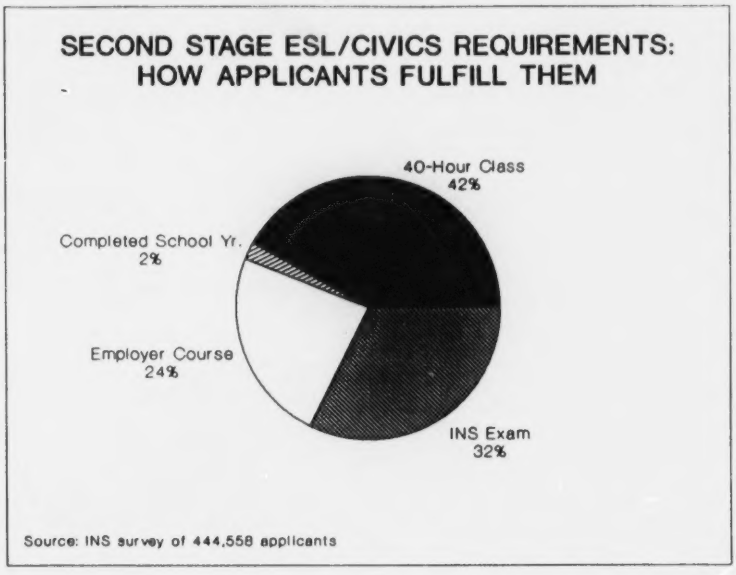
FIGURE 2



c. Capacity of ESL/civics Classes

The success of legalization's second stage depends upon the capacity of the nation's educational system to provide English as a Second Language (ESL) and civics courses to applicants who need them in order to fulfill their requirements for permanent residence. NCLR estimates that over 975,000 newly legalized persons nationwide will need to enroll in ESL/civics classes in order to meet second-stage requirements. Figure 3 indicates how second-stage applicants have fulfilled their requirements thus far, showing a significant dependence upon ESL/civics classes.

FIGURE 3



Many immigrants who have limited educational backgrounds will have to rely on classes in order to fulfill the requirement. Even immigrants who might be qualified to take the examination, and would pass it without difficulty, appear reluctant to simply take the test without prior instruction, either through a 40-hour class or through other means.

Legalization-generated demand for ESL and civics classes, which is challenging a system already under severe pressure prior to IRCA, will require the educational delivery system to expand significantly in a short period of time. Shortages in classes for second-stage applicants could mean that significant numbers of temporary residents who are otherwise eligible for adjustment to permanent residence will lose their legal status.[7]

In the long term, the development of the infrastructure which provides ESL and civics classes to the newly legalized is critical to the realization of the goal of the Wright amendment, which was to provide these immigrants with the skills necessary to integrate fully into U.S. society. Even if enough course providers emerge to assist applicants in meeting their second-stage requirements, courses may not be available to provide further instruction to those who need it. Surveys of the newly legalized population and advocacy from the service providers and students themselves suggest that the goal of providing education which is sufficient to help the newly legalized "cross the bridge into full participation" is in danger of not being fulfilled.

d. State Legalization Impact Assistance Grants

The availability of funding to support ESL/civics courses and other services to the newly legalized is critical to the second stage of legalization as well as to the long-term

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[7] For a more detailed analysis of the requirements of the second stage and its policy implications, see NCLR's policy memorandum, "The Missing Link: Community-based Organization Participation in ESL/civics," February 1989.

goal of promoting full participation. IRCA authorized $1 billion per year for four successive fiscal years for State Legalization Impact Assistance Grants (SLIAG). SLIAG is designed to assist states in supplying public benefits, health and educational services to newly legalized persons. The Department of Health and Human Services (HHS) administers SLIAG at the national level, distributing funds to the states according to the number of people legalized in each state and other factors. According to federal guidelines, 10% of SLIAG funds must be allocated to each of these three program areas -- public benefits, health, and educational services -- with the remaining 70% to be allocated according to local service needs and priorities.

Part of the intent of the educational component of SLIAG was to assist temporary residence applicants in meeting the requirements for the second stage. However, consistent with the intent of the Wright amendment, Congress also made SAWs eligible to receive SLIAG-funded services, indicating that SLIAG is intended not only to fulfill certain legal requirements, but also to assist the newly legalized in many elements of their adjustment to life out of the shadows of U.S. society.

Several early implementation problems have severely hindered the development of the SLIAG program, and the availability of funds at the state level. First, HHS was extremely slow in issuing regulations and guidance to the states. Second, the rules are so complex that states continue to have difficulty interpreting them, and following the cumbersome rules which allow them to claim reimbursements for costs they have already incurred serving newly legalized persons. In addition, according to the American Public Welfare Association,

> ...there have been conflicting federal interpretations on precisely which program costs are to be reimbursed by SLIAG; what methods states are to use to determine the number of Eligible Legalized Aliens (ELAs) served; and the methodologies permitted for calculating state costs incurred. Though states submitted to HHS 1988 end-of-year reports on identified SLIAG reimbursable costs, these fell far short of the costs actually incurred. Because of the difficulties in identifying ELAs, tracking their use of allowable services, and identifying the attendant costs, the reports do not fully capture state expenditures.[44]

The difficulties in starting SLIAG programs in the states have led to the false impression on the federal level that there is a surplus of SLIAG funds. Congress has already diverted over $500 million from SLIAG to other programs. Though Congress has apparently committed itself to replacing the funds in 1992, state and local governments, fearing that they may not be reimbursed for the cost of offering vital services to newly legalized persons, may be forced to cut programs, including the vitally important ESL and civics classes. President Bush recommended a rescission of an additional $500 million from SLIAG in his proposed budget for Fiscal Year 1991, prompting speculation that Congress could again consider cutting vitally needed SLIAG funds. Cuts in SLIAG jeopardize both the success of the second stage of legalization and the ability of the newly legalized to integrate fully into U.S. society.

e. Those Left Behind

The legislative history of IRCA clearly indicates that Congress intended legalization -- combined with employer sanctions and enforcement efforts -- to eliminate the sizeable undocumented underclass living within the borders of the United States. Any analysis of the success or failure of legalization must therefore examine not only the extent to which legalization succeeded in maximizing the number of persons brought out of subclass status, but also the size of the undocumented community which remains after legalization, or those "left behind."

1) The Legalization-Eligible Population

The best and most frequently-cited estimates of the undocumented population come from the Bureau of the Census. Using a residual technique, the 1980 Census "counted" about 2.1 million undocumented alien "residents" in the United States. The Census also estimated the extent to which it undercounted the undocumented resident population, projecting a total 1980 undocumented population of 2.5 to 3.5 million.[45] Other researchers have suggested a two to four million range as most plausible.[46] Respected immigration scholar Charles Keeley has suggested that the Census may have undercounted this population by one-third to one-half, which would produce a range of three to four million in 1980. A number of other studies support this assertion.[47] Based on these studies, NCLR estimates a lower bound of 2.5 million, a "moderate" estimate of three million, and an upper bound of 3.5 million undocumented persons resident in the United States as of 1980.

Because the legalization program covered undocumented persons who had continuously resided in the United States since before January 1, 1982, the above figures must be adjusted to reflect the growth in the undocumented population between April 1980, when the Census was carried out, and January 1, 1982. Based on data from the Current Population Survey (CPS) and using residual techniques, the Census has "counted" annual net growth in the undocumented population of about 100,000 per year since 1980, with an estimated range (to adjust for undercounts) of between 100,000 and 300,000.[48] For the purposes of this paper, NCLR has multiplied the lower (100,000), moderate (200,000) and upper (300,000) boundaries by a coefficient of 1.75* to produce an estimate of net growth from April 1980 to January 1982.

These estimates produce the results illustrated in Figure 4.

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* The 1.75 coefficient is used because the time period between April 1980 and January 1982 is one and three-quarters years.

FIGURE 4
NET GROWTH IN ILLEGAL IMMIGRANT POPULATION: 1980 - 1982
(Millions)

	Lower	Moderate	Upper
1. 1980 Population	2.5	3.0	3.5
2. 1980-82 Growth	0.175	0.350	0.525
3. Total Population as of January 1, 1982	2.675	3.350	4.025

Note: These estimates are consistent with those of the Bureau of the Census, which indicate a range of 2.5 to four million undocumented persons in the U.S. as of January 1, 1982.[49]

Not all these persons, however, were eligible for legalization. In order to account for persons who would not have qualified, NCLR has estimated that approximately 10% did not meet the legalization program's requirements.* The Carnegie Endowment for International Peace has estimated that between 16% and 32% of the undocumented population in the U.S. as of January 1, 1982 were not likely to apply for legalization because they found other ways to adjust their status, or for other reasons. NCLR has used the mid-point of that range, or 24%.** Together, these estimates of individuals likely to be out of the pool of eligible persons produce the results shown in Figure 5.

Thus, NCLR estimates the number of legalization-eligible persons at 1.765, 2.21, and 2.66 million persons for the lower, moderate, and upper ranges, respectively. Statistics from the legalization program indicate that it is reasonable to assume that 95% of the total legalization applicants, or 1.67 million persons, will ultimately benefit from legalization. NCLR believes that the number of persons who were eligible for legalization fell somewhere

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* NCLR estimates that, of the total undocumented population in the U.S. as of January 1, 1982, 10% were not eligible for legalization due to the following factors: failure to meet the continuous residence requirement, failure to meet the continuous physical presence requirement, conviction for one felony or more than two misdemeanors, or on other grounds of excludability under the Immigration and Nationality Act.

** These estimates account for mortality, emigration and deportation, and adjustment of status, which would reduce the size of the population likely to qualify for legalization (Meissner and Papademetriou, pp. 81a, 81b).

between the moderate and upper estimates;* however, even using the moderate figure, as many as 540,000 individuals who were eligible for legalization did not apply.

FIGURE 5
ESTIMATE OF LEGALIZATION-ELIGIBLE POPULATION
(Millions)

	Lower	Moderate	Upper
1. January 1, 1982 Population	2.675	3.350	4.025
2. Not qualified (10%)**	-0.27	-0.34	-0.40
3. Not likely to apply (24%)	-0.64	-0.80	-0.97
4. Estimated Eligibles	1.765	2.21	2.66
5. Estimated Legalized	1.67	1.67	1.67

2) Estimates of the Overall Undocumented Population

In addition to the number of individuals who were probably eligible for legalization but did not come forward, Census Bureau data can be used to estimate the total number of undocumented individuals who currently reside in the United States. Using the same figures to estimate the lower, moderate, and upper boundaries of growth in the undocumented population per year, we achieve the estimates in Figure 6.

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* The lower range is statistically implausible. First, it assumes that the 1980 Census counted all undocumented persons in the U.S. Similarly, it assumes that CPS correctly "counted" the growth of the undocumented population for the period between 1980 and 1985. No reputable demographer would support these assumptions; the estimated 1980 Census and 1980-85 CPS undercounts range from 60% to 100%.

** NCLR has taken into account the fact that persons who were deported from the U.S. fall into our estimate of 10% not qualified for legalization **and** the Carnegie Endowment's estimates of those not likely to be potential legalization applicants. We have discounted these figures from our estimate of those likely to be ineligible to arrive at the 10% figure.

Evidence that employer sanctions or increased border enforcement have reduced unauthorized entry into the U.S. is controversial and uncertain. Even those who assert that employer sanctions have had an effect on illegal entry acknowledge that the absolute number of unauthorized entrants in the post-IRCA period is of the same magnitude as prior to IRCA's enactment.[50] Thus, in Figure 6, NCLR has assumed that growth in the undocumented population did not change substantially in the post-IRCA period, a conclusion confirmed by the 1988 CPS by the Bureau of the Census.

However, even if it were assumed that all illegal border crossings stopped in November 1986, the low, moderate, and upper ranges of the total undocumented population would be 1.0, 2.6, and 3.7 million, respectively. In short, even by the most conservative estimates, significant numbers of undocumented residents remain in the United States after legalization.

FIGURE 6
ESTIMATE OF OVERALL UNDOCUMENTED POPULATION AS OF JANUARY 1, 1990*
(Millions)

	Lower	Moderate	Upper
1. Undocumented Population as of January 1, 1982	2.675	3.350	4.025
2. Growth: 1982 - January 1, 1990	+0.8	+1.6	+2.4
3. Less Number Legalized	1.67	1.67	1.67
4. Total Population on January 1, 1990	1.805	3.280	4.755

NCLR believes that the actual number of undocumented residents in the U.S. in 1990 lies somewhere between the middle and upper ranges shown in Figure 6. Figure 7 compares the likely size of the undocumented population today with its likely size in 1982, when the

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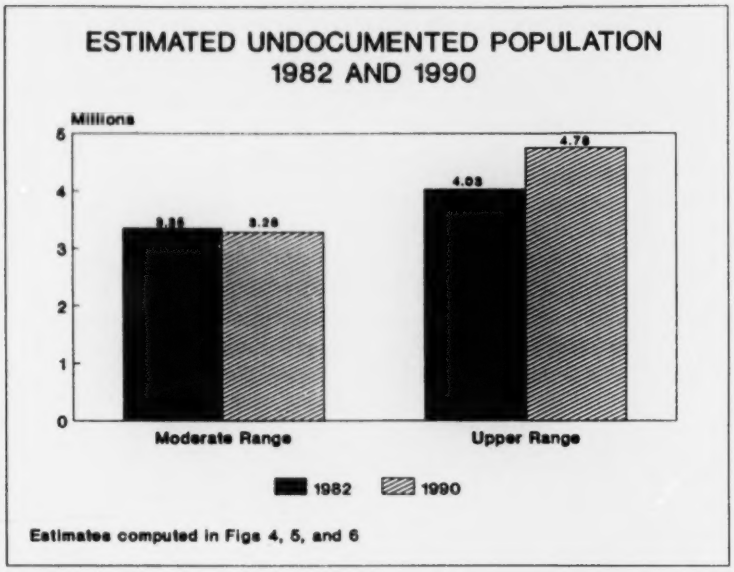
* Though the SAW program also legalized a large number of undocumented persons, these individuals were not necessarily long-term residents of the United States, but rather part of the migrant stream from Mexico. NCLR therefore did not include them in estimates of the undocumented population living in the U.S., nor in the total number legalized.

FIGURE 7

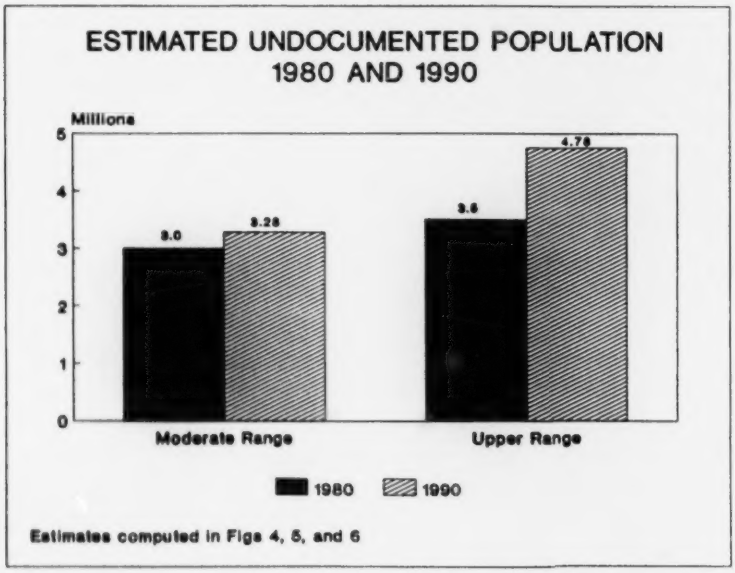


first version of IRCA passed the Senate. Figure 8 makes the same comparison between 1980 and 1990.

Clearly, many people benefitted from the legalization program, and are living changed lives as a result. However, when measured against the standard set by the Select Commission, which proposed legalization as a method of significantly reducing, if not eliminating, the exploitable subclass of undocumented U.S. residents, legalization fell far short of its goal. In fact, legalization has had only a marginal effect on the size of the undocumented population.

In their discussions of the need for a legalization program, the Select Commission and the Congress both emphasized the social costs associated with a large population living unlawfully within the United States. If a sizeable undocumented population is indeed harmful to the nation, then the United States after IRCA continues to confront a vast problem. There are at least as many undocumented persons living within the U.S. now as there were when the Select Commission made its recommendations in the early 1980s and the serious debate over IRCA began.

FIGURE 8



III. EMPLOYER SANCTIONS

A. Overview

If the purpose of legalization was to open the "front door" for illegal immigrants who had made their lives in the U.S., then the other major component of IRCA, employer sanctions, was clearly intended to close the "back door" of illegal immigration. By making it illegal to knowingly hire, recruit or refer for a fee any unauthorized worker, proponents of sanctions sought to eliminate the "magnet" of jobs drawing undocumented persons across the border.

The effectiveness of employer sanctions as a strategy to deter illegal immigration had been debated in Congress since 1971, when the first of a succession of bills on illegal immigration was passed by the House of Representatives. Proponents of the idea, including the Select Commission, saw sanctions as a way of eliminating the "pull factor" of employment drawing people across the border:

> Without an enforcement tool to make the hiring of undocumented workers unprofitable, efforts to prevent the participation of undocumented/illegal aliens in the labor market will continue to meet with failure. Indeed, the absence of such a law serves as an enticement for foreign workers. The Commission, therefore, believes some form of employer sanctions is necessary if illegal migration is to be curtailed. [51]

The terms "regaining control of the border" and "curtailing illegal immigration" echo throughout the legislative history of IRCA; employer sanctions were clearly viewed as a solution to the nation's preoccupation with rising illegal immigration.

IRCA makes employers the focal point of the policy, requiring them to fill out a form (I-9) indicating that they have checked the documents of each of their new employees. Employers can be fined for knowingly hiring undocumented workers or for failing to fill out the required I-9 forms. Employers are also subject to criminal penalties if the violation constitutes a "pattern and practice" of knowingly hiring undocumented workers. According to a study by the Rand Corporation and Urban Institute, average fines have ranged from $850 in some parts of the country to over $45,000 in other areas. Criminal penalties have been enforced somewhat less vigorously.[52]

During the debate on employer sanctions, critics raised two principal concerns about this strategy for controlling illegal immigration. The first concern was that sanctions, because they affect all of the over seven million employers in the United States, would be difficult -- if not impossible -- to enforce adequately. The experience of other countries and individual U.S. states with employer sanctions laws had shown them to be of questionable effectiveness; the assertion that they would be enforceable on a nationwide scale in the United States seemed to critics implausible.[53] In addition, the questionable record of the INS as an enforcement

agency raised questions that the agency would be able to effectively educate seven million U.S. employers and enforce the law over such a large population.

The second major concern raised by opponents of employer sanctions was the fear that the policy would cause discrimination. Hispanic groups in particular expressed concern that, because of sanctions, employers were likely to discriminate against individuals who, on the basis of physical characteristics, are perceived as being "foreign." Evidence of employer behavior during the public debate on employer sanctions showed that employers responded to IRCA even before it passed by adopting discriminatory behavior against Hispanics who were lawfully entitled to work.[54]

Congress responded to concerns about discrimination by adding civil rights protections to IRCA, and by creating an office within the Justice Department to enforce them. In addition, the statute required three reports by the General Accounting Office (GAO) to determine whether the law had caused a "widespread pattern of discrimination." A "sunset" provision would have allowed Congress to repeal employer sanctions within 30 days if the GAO found such discrimination.

The following section focuses on these concerns, assessing recent evidence on the effectiveness of employer sanctions in reducing undocumented immigration and on their discriminatory effect. Enforcement of employer sanctions thus far has not yielded the definitive reduction in undocumented migration or labor anticipated by Congress. In fact, it is not clear that employer sanctions can accomplish their objective. In addition, there is an overwhelming body of evidence that employer sanctions are causing massive discrimination against U.S. citizens and lawfully authorized workers.

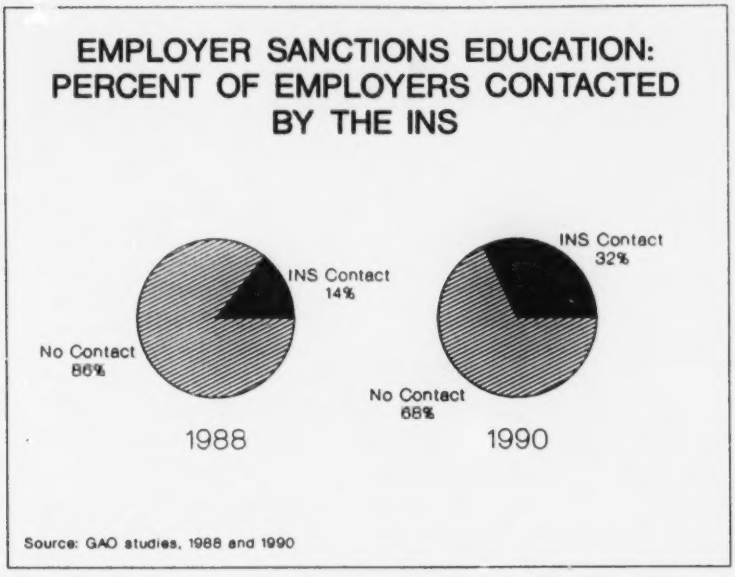
B. Effectiveness of Employer Sanctions

1. Employer Understanding of and Compliance with IRCA

The INS has an enormous education task as a result of employer sanctions. The nation has millions of employers who must comply with the law if it is to achieve the desired effect of eliminating employment opportunities for undocumented workers. The INS education effort thus far has consisted of mailing an informational booklet to a target list of seven million employers, placing ads in major media, conducting educational visits, giving seminars, and responding to telephone calls and written requests for information. By September 1, 1989, the INS had made over 2.2 million such educational contacts with employers, a significant increase over the one million contacts reported by the General Accounting Office (GAO) in November 1988.[55]

For both its 1988 and 1990 reports, the GAO conducted an extensive survey to test employers' reactions to the new law. The data in these reports lead to several interesting comparisons between employer education and the level at which employers understand and

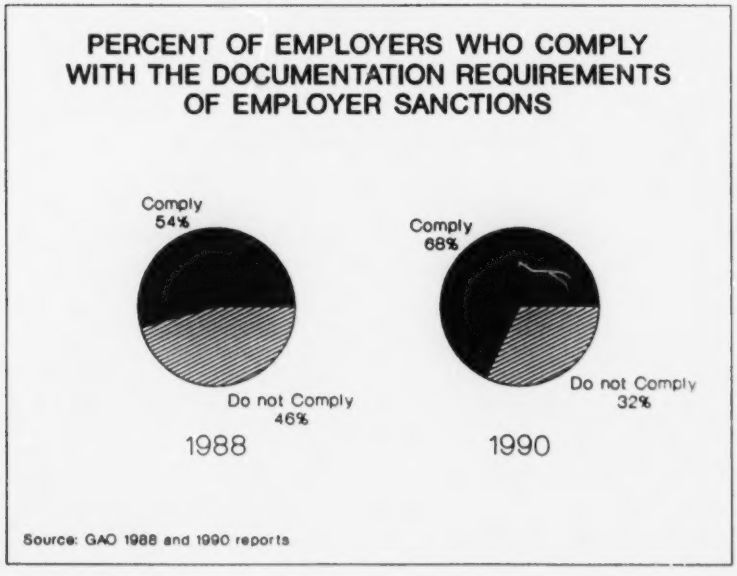
FIGURE 9



comply with the law. Figure 9 shows the proportion of employers contacted by the INS in 1988 and 1990.

The 1988 GAO report showed that, despite a significant media campaign and over one million direct employer contacts, 22% of employers surveyed were completely unaware of IRCA. Of those familiar with IRCA, as many as 20% did not understand its major provisions.[56] Though the INS responded by pointing out that the GAO results were based on a survey sent to employers in November 1987, before major education initiatives took place, an analysis of IRCA prepared by the office of Congressman Charles Schumer (D-NY) indicated a "need to reconsider and reassess the education efforts now in effect."[57] Figure 10 illustrates the GAO estimates of compliance with employer sanctions based on the INS education effort.

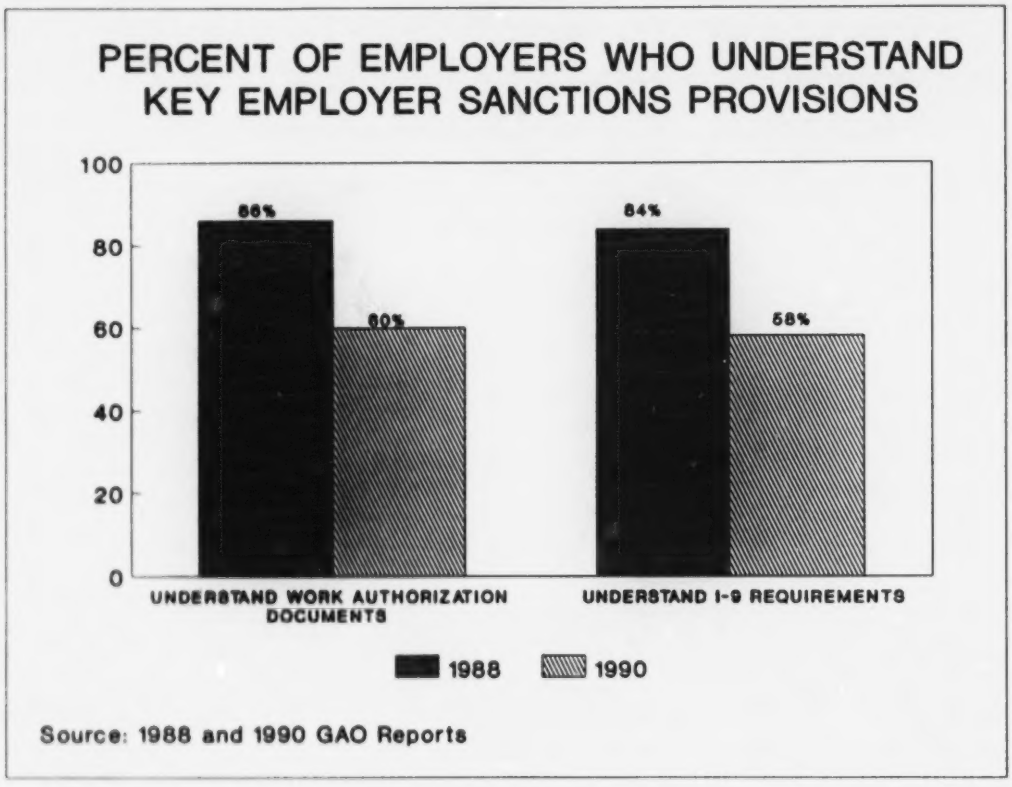
FIGURE 10



Following the second GAO report, the INS increased its education efforts, contacting 1.2 million additional employers. The results, as indicated in the 1990 GAO employer survey, showed that the number of employers completely unaware of the law had decreased modestly, from 22% to 17%. However, though employer **awareness** of the law increased by 5 percentage points, employer **understanding** of the law's

provisions decreased significantly for all of the major employer sanctions provision. Figure 11 shows the decline in employer understanding of employer sanctions between 1988 and 1990.

FIGURE 11



The GAO reports present only a slightly more hopeful picture of the effects of employer education on compliance with IRCA's provisions. In both reports, the GAO measured the percentage of employers visited by the INS and those who had not received visits, and determined what proportion of each group was complying with the law by completing the required I-9 forms for new employees. Though filling out the I-9 form is not a total measure of compliance with employer sanctions, it is some indication of how well the message of the INS is reaching the population which is expected to carry out the law. Failure to complete I-9 forms for every new employee is a violation under IRCA, even if no unauthorized worker is hired.

Data on the number of employers who comply with the paperwork requirements of employer sanctions suggest that employer education is only modestly effective in increasing employer compliance with the law. According to both the second and third GAO reports, of

employers who had been contacted directly by the INS, approximately 80% were likely to be complying with the paperwork requirements of employer sanctions. Among employers not contacted by the INS, 50% were complying with the documentation requirements according to the second GAO report, and 57% according to the third GAO report.[58]

The GAO found that, though employer visits increased by 120% in the period between November 1988 and August 1989, employer compliance with sanctions is likely to have increased by much less than that amount, or 75.5%. Despite a significant effort by the INS to increase employer education, as many as 2.2 million employers are likely not to be complying with the paperwork requirements of employer sanctions.*

The results of the GAO surveys raise serious doubts about the ability of education campaigns, even when conducted vigorously, to inform effectively the target community of seven million employers. The fact that the target group is really a "moving target," with large numbers of new employers entering the arena every year, explains at least in part why the INS appears to be approaching the ocean of employer education with a proverbial teaspoon. Even after exhausting substantial resources in employer education, the INS has been able to make only a modest dent in the number of employers who fill out the paperwork required by the law. Worse still, the number of employers who feel that they understand the law has dropped considerably, even while education has increased. Even with a consistent, massive education effort, there is ample room to doubt that employers can ever be adequately informed about their responsibilities under IRCA. The effectiveness of the law from this standpoint is, at best, highly uncertain.

2. Enforcement of Employer Sanctions

Several different reports on INS enforcement and implementation of employer sanctions agree that the agency has done an adequate job of enforcing the new law. In fact, considering the vast scope of its new responsibilities under employer sanctions, the energy which the INS has put into fulfilling its new role is noteworthy. According to the third GAO report, "INS has developed plans and policies and has implemented procedures for the program that we believe could reasonably be expected to identify and fine violators and educate employers."[59]

A recent study by the Rand Corporation and the Urban Institute verifies the GAO's finding (See Figure 12 for a summary of this and other studies cited in this section). According to the study, "The Agency [INS] has begun transforming itself from a paramilitary and police agency into a regulatory law enforcement agency that emphasizes investigative and

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* INS data, presented in the form of testimony by Commissioner Alan Nelson before the House Subcommittee on Immigration, Refugees and International Law in May 1989, confirm the employer compliance rates estimated by the GAO.

educational activities."[60] The study, however, concludes that though the INS has done a good job in starting up the program, there are strong reasons to doubt that the INS can enforce sanctions adequately over the long term. The report outlines a number of issues which "...threaten the future of employer sanctions ":

- INS implementation and enforcement of employer sanctions vary substantially in different regions of the country, creating "serious inequities";
- Low levels of enforcement could lead employers to believe that they will not be punished for sanctions violations, thereby reducing the deterrent effects of the policy;
- Arbitrary use of criminal sanctions provisions could subject sanctions enforcement to serious legal challenges; and
- Lack of improvements in INS investigative capacity could limit its ability to enforce sanctions in the industries which depend most heavily on immigrant labor.[61]

While the initial efforts of the INS in enforcing employer sanctions have won praise, there is substantial room for doubt that an agency known for applying policies inconsistently and for inefficient management can successfully implement a policy which affects the vast majority of the nation's employers. As the Rand/Urban Institute study on sanctions implementation points out, the fact that the INS has done a reasonable job during the "start-up" phase of the program does not suggest that the INS can effectively enforce employer sanctions over time.

Although it appears that increased activity on the part of the INS is essential to the long-term effectiveness of employer sanctions, it is not clear that funding will be made available to the INS to support even current levels of activity, much less increases. The INS has seen significant funding increases in the last decade, in a time of severe budgetary constraint, but it appears unlikely that the agency will receive resources sufficient to step up enforcement activity. In fact, the INS has already reduced its capacity to educate employers about employer sanctions, despite the fact that the GAO and other studies confirm that large numbers of employers remain uninformed or poorly educated about the policy. One INS official has stated,

> Frankly, the administration of immigration law is a nightmare. We have 1,700 investigators working on employer sanctions nationwide. If we had 1,700 in New York alone, we still couldn't adequately enforce the law.[62]

FIGURE 12
SUMMARY OF RECENT RESEARCH ON THE EFFECTIVENESS OF EMPLOYER SANCTIONS

TITLE	METHODS USED	KEY FINDINGS
Los Migrantes de la Crisis: The Changing Profile of Mexican Labor Migration to California; (Wayne Cornelius, Center for U.S.-Mexico Studies, 11/88)	Field studies including personal interviews of employers, employees, job seekers, and residents of rural "sending communities" in Mexico	- IRCA has had no dramatic impact on the California labor markets in which undocumented immigrants typically participate - A large scale flow of undocumented migrant labor persists - There has been no appreciable return migration of undocumented persons to Mexico
U.S. Immigration Reform and Control Act and Undocumented Migration to the United States; (Michael J. White, Frank D. Bean, Thomas J. Espenshade, Rand Corporation/ Urban Institute, 7/89)	Statistical model analyzing the determinants of line-watch apprehensions at the border from 1977-1988	- The effects of IRCA are smaller than is sometimes inferred - Since the law was passed, border apprehensions have declined by 35%: 12% due to increased INS effort; 17% due to the SAW program; and 71% due to IRCA's "deterrent effect"
Enforcing Employer Sanctions: Challenges and Strategies; (Michael Fix, Paul T. Hill, Rand Corporation\Urban Institute 5/90)	Data collection in various INS regions, and interviews with government officials, INS staff, public service providers and other community leaders	The implementers of employer sanctions have met the challenges of the law's first 3 years, but if implementation proceeds along current lines, the long-term effectiveness of sanctions is threatened. Several factors could jeopardize the efficacy of the policy
Post-IRCA Changes in the Volume and Composition of Undocumented Migration to the United States: An Assessment Based on Apprehensions Data; (Frank D. Bean, Thomas J. Espenshade, Michael J. White, Robert F. Dymowski, Rand Corporation/ Urban Institute, 1/90)	Statistical model incorporating IRCA and non-IRCA factors, used to determine which changes since enactment of IRCA are attributable to the law	- Border apprehensions are 47% below where they might have been without IRCA, however, "It is impossible to tell from this overall total alone whether IRCA is having its intended effect"
The Effects of Employer Sanctions on the Flow of Undocumented Immigrants to the United States; (Keith Crane, Beth J. Asch, Joanna Zorn Heilbrunn, Danielle Cullinane, Rand Corporation/ Urban Institute, 4/90)	Analysis of the indications of undocumented entry to the U.S., and a survey of U.S. labor markets in immigrant dependent industries	- The number of border crossings by women and children have increased, though the number of males has apparently decreased - Sanctions has led to a decline in the flow of undocumented workers, but the decline has been small

FIGURE 12, CONT.

TITLE	METHODS USED	KEY FINDINGS
Initial Effects of Immigration Reform on Farm Labor in California; (Phillip Martin, J. Edward Taylor, Rand Corporation/ Urban Institute, 3/90)	Survey of California farm employers	- Farm employers are not yet adjusting to IRCA - Instead of revising personnel policies, farmers expect to hire more workers through farm labor contractors, long a source of illegal workers
Shifting the Burden: The Impacts of IRCA on U.S. Labor Markets; (Robert Bach, Howard Brill, Institute for Research on Multiculturalism and International Labor prepared for the U.S. Department of Labor, 2/90)	Ongoing research in 4 major cities and rural areas, across the garment, construction, restaurant, cleaning and maintenance, poultry processing, and meat packing industries	- IRCA has not had a significant impact on the type of labor market conditions anticipated by the Law - Undocumented workers are being pushed further underground since IRCA was enacted.
Employer Sanctions: A Preliminary Assessment; (Demetrios G. Papademetriou, B. Lindsay Lowell, Deborah Cobb Clark, Rand Corporation / Urban Institute, 7/90)	Analysis of border apprehension data; survey of research on illegal immigration; survey of experience in Western Europe	- Some employment practices appear to be changing as a result of employer sanctions, but legal status is not yet an employment standard for which employers expect to be held accountable - Sanctions are less effective as the only element of an illegal immigration control strategy. Other elements must be enforced as well
Employer Compliance with IRCA Paperwork Requirements: A Preliminary Assessment; (Shirley J. Smith, Martina Shae, Rand Corporation/ Urban Institute, 2/90)	Analysis of GAO, Department of Justice, Department of Labor data on employer compliance with IRCA's paperwork requirements	- Firms in the industries of highest alien concentration are least likely to conduct work authorization checks - Firms in high-alien states are somewhat more likely than those in other states to meet the documentation requirements - Larger firms are more likely to comply than smaller firms - Compliance data do not address the degree to which the intent of IRCA is being met

3. Employer Behavior Since Enactment of IRCA

Even if 99% of all employers were informed of their responsibilities under IRCA, and were in full compliance, if the remaining 1% included employers who had traditionally hired unauthorized workers and who chose to continue doing so, the effects of sanctions as a deterrent to illegal migration would probably be limited. Based on a total employer population of seven million, if 1% of employers employed 10 unauthorized workers each, the U.S. would have an undocumented workforce of 700,000 employees, despite employer sanctions.

A Rand Corporation and Urban Institute study of the effects of IRCA on farm labor points out that it is still unclear how employers in agriculture -- a sector traditionally reliant on undocumented labor -- are responding to employer sanctions. The study points out that while employers may adapt their behavior in response to the law, the adaptation may not include eliminating or even reducing the practice of hiring unauthorized workers. Agricultural employers could, instead, turn to greater use of farm labor contractors (FLCs), whom they perceive as a buffer between themselves and immigration laws.[63] According to the study, "FLCs traditionally supplied large numbers of new immigrants for short-term farm jobs by tapping into migrant 'networks' that extend from the fields of California to villages in the most remote corners of Mexico."[64] The study points out that the role of FLCs has increased dramatically since enactment of IRCA, possibly providing an "escape valve" to employers who will continue indirectly to hire undocumented laborers.

There are growing indications that some employers in other sectors also continue to employ -- and exploit -- undocumented workers, despite employer sanctions. The 1988 GAO report points out that there have been reports of employers lowering the wages of unauthorized workers in order to offset the adverse effects of employer sanctions fines.[65] Similarly, there is growing evidence of continuing exploitation of undocumented workers throughout the country. For example, the *New York Times* reported that "despite the Government's effort to turn the workplace into the front line in the battle against illegal immigration, most illegal aliens are able to find jobs in the United States.[66] Similarly, the *San Antonio Light* reported that "undocumented workers enticed by employment ads aired by a radio station and placed in print media throughout South Texas found themselves on a 'swift ride to hell.'"[67] Energetic advertising was luring workers from well within Mexico to travel as far as Rhode Island, Chicago, and Seattle to find work, accompanied by miserable wages and working conditions. In addition, since IRCA passed, day labor pools have begun to emerge in areas with large numbers of unauthorized workers. The City of Los Angeles has been actively involved in organizing sites for undocumented day laborers to gather and find employment, a strategy which appears to be a direct response to IRCA.

In their recent book, immigration scholars Alejandro Portes and Ruben Rumbaut express skepticism that employer sanctions will have the sweeping effect on unauthorized labor that their sponsors intended. They draw a parallel between the enactment of employer sanctions and one comparable event in U.S. history, the end of the notorious *Bracero*

Program. According to Portes and Rumbaut, the 1964 termination of the *Bracero* Program "was prompted by the desire to curtail low-wage foreign labor; instead, this Mexican labor inflow went underground and then expanded rapidly."[68] There is some evidence to suggest that employer sanctions have similarly pushed the undocumented labor stream further underground, subjecting potentially large numbers of unauthorized workers to the very exploitation which IRCA sought to eliminate.

4. Border Apprehension Levels Since Enactment of IRCA

Supporters of employer sanctions frequently point to border statistics to indicate that the policy is indeed effective. Using raw apprehension data, the INS has testified before Congress that:

> ...employer sanctions are having the intended effect of reducing illegal immigration. Apprehensions of illegal aliens at the southern border dropped significantly in the first half of fiscal year 1989 from 498,494 [in 1988] to 339,546, a decrease of nearly one-third."[69]

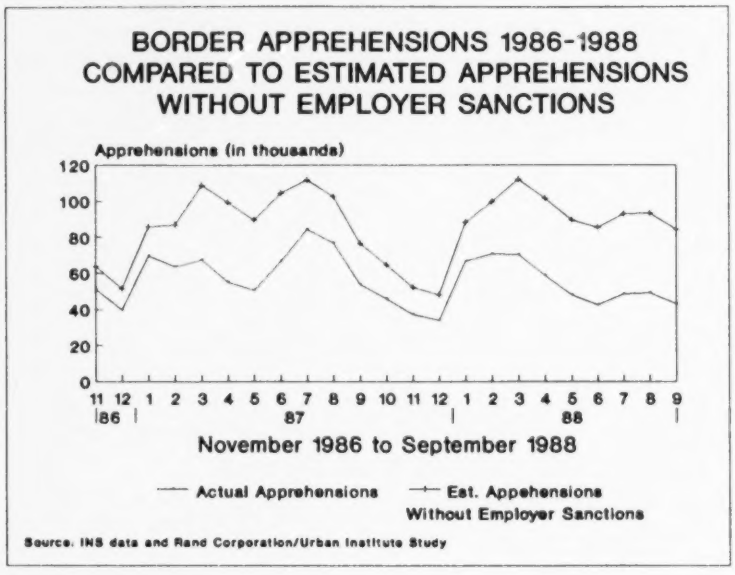
Several studies verify the INS findings. In their study of the legalization program, David North and Anna Mary Portz found that the average number of apprehensions per officer-shift changed from 3.96 (or .396 per officer hour) in 1985 and 1986, to 2.84 (.284 per hour) during the first year of IRCA's enactment, rising again to 3.02 during IRCA's second year. Based on their figures, North and Portz concluded that "the estimated number of illegal entries will be about 40% below the pre-IRCA level in the third post-IRCA 12-month period."[70]

The Urban Institute and Rand Corporation, in a study of the effects of IRCA on border crossings, used a time series analysis to determine how a number of factors, including Mexican population growth, economic conditions, and INS resources, affect border apprehensions, and by implication, the flow of undocumented migrants to the United States. Though the analysis is structured differently from that outlined above, the fundamental results are similar. According to the report,

> Our analysis indicates that the effects of IRCA are smaller than is sometimes inferred, but are still associated with a cumulative net reduction of apprehensions of nearly 700,000, or 35% below what would have been anticipated if circumstances had not changed, in a 23-month period following enactment of the law.[71]

Figure 13 shows border apprehensions from 1986 to 1988, along with the Urban/Rand study's projections of what they would have been without employer sanctions.

FIGURE 13

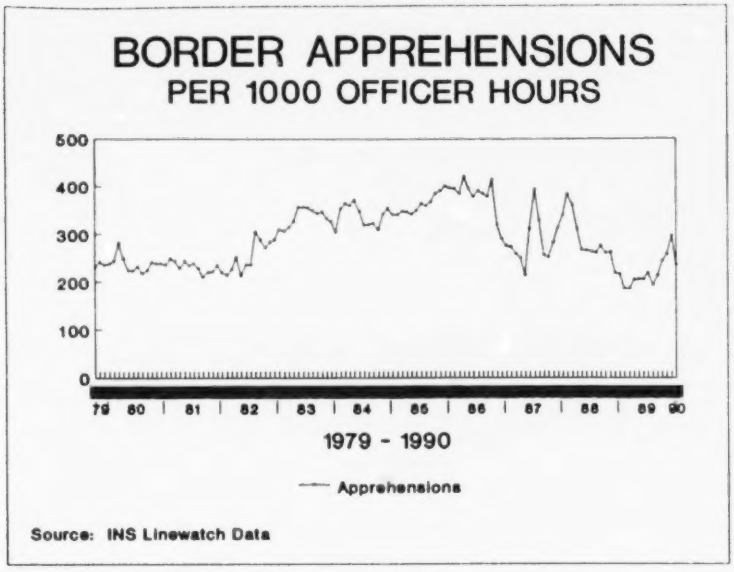


Even the authors of these analyses acknowledge that their finding should be interpreted with caution. The statistical model which the Urban/Rand study used to quantify the contribution of IRCA to the decline in linewatch apprehensions may be of limited accuracy. The report quite rightly points out that "the level of apprehensions is affected by many factors, including those having nothing to do with IRCA."[72] The authors analyze three critical factors which lead to apprehensions at the U.S. border: the population "at risk" of migrating; the propensity to migrate; and the probability of being apprehended. While these factors are indeed indications of the true nature of border crossing data, the analysis of several of these factors is problematic. For example, the study takes into account that, by legalizing a large number of individuals, the SAW program probably played a role in reducing illegal border crossings; however, the study ignores the legalization program (for those who entered the U.S. before January 1,1982), which probably also reduced border crossings. Another problem with the analysis is that it determines the population likely to migrate using the size of the entire young-adult population in Mexico, an arguably over-broad interpretation of the number of potential migrants to the U.S.

Other studies, including an analysis of Mexican migration by Wayne Cornelius of the Center for U.S.-Mexican Studies at the University of California at San Diego, provide specific information on the nature of the population likely to migrate and their reactions to the enactment of IRCA. Cornelius identifies specific "sending communities," areas in Mexico which have traditionally supplied large numbers of migrant laborers to the U.S. Cornelius' results suggest that the Urban Institute determination that the entire young-adult population of Mexico is "at risk" of migrating is excessively broad, and may have led to an overestimation of the effects of employer sanctions as a deterrent to illegal immigration.[73]

Most analysts agree that it is still relatively early to assess whether sanctions are proving effective in reducing or eliminating undocumented migration to the United States. Michael Hoefer, of the Statistical Analysis Division of the INS, found that although apprehensions per officer hour have decreased since IRCA was signed into law, they seem to have levelled off at .256 average monthly apprehensions per hour, a rate slightly higher than

FIGURE 14



the levels found before August 1982 (.235 apprehensions per hour).[74] Figure 14 shows border apprehensions by linewatch hour from 1979 to 1990, indicating that apprehensions have been reduced since IRCA was enacted, though they appear to have stopped declining since the end of 1988.

The fact that border apprehensions may no longer be descending is significant; if sanctions have reduced border crossings, they clearly have not reduced the flow compared to 1981. Hoefer's analysis suggests that they have reduced border crossings only to the same level found at the beginning of the immigration reform debate. In fact, a spate of recent media reports, appearing in the *New York Times*, the *Los Angeles Times*, and the *Washington Times*, have focused on growing pressure at the U.S.-Mexico border, reflecting a widespread public perception that illegal immigration seems to be increasing despite employer sanctions.[75] INS data confirm that in recent months, apprehensions at the border are indeed on the rise. For example, in San Diego County, a major border crossing point, the number of apprehensions of undocumented immigrants has now matched its all-time peak level in 1986.[76]

5. Evidence of Changes in the Labor Market

There is a growing body of evidence that the internal labor market conditions that IRCA sought to alter are unaffected by the policy. For example, an interim report prepared for the Department of Labor indicates that employer sanctions appear not to be achieving their objective. The study's findings include:

- "Employer sanctions have had very few of the intended effects on reshaping labor market conditions to deter unauthorized immigration";
- IRCA has "failed to make legal status an enforceable employment standard for which employers can be held accountable";
- Employer sanctions are "unlikely to alter the magnet of employment offers which sustains the undocumented flow"; and

- Undocumented workers "face greater difficulties in the labor market and increasingly must seek out marginal, temporary labor. Day labor pools have expanded, along with complaints about abusive employment practices...."[77]

Research by the Rand Corporation and Urban Institute also indicates that IRCA has not had much of an effect on the labor market which attracts undocumented workers. According to one study,

> Our labor market survey indicates that any decline in undocumented immigration has been small. The labor market survey registered no changes in the supply of labor in two occupations -- dishwashers and car washers -- where undocumented workers tend to concentrate.[78]

In fact, because employer sanctions have made it illegal to hire unauthorized workers, these individuals, rather than departing, are apparently being pushed further "underground" and are becoming more vulnerable to exploitation than they were prior to enactment of the law. Several studies confirm that undocumented individuals continue to work, and that their conditions are as bad as or worse than they were prior to IRCA.[79] The General Accounting Office, in an analysis requested by Congressman Charles Schumer (D-NY), found that sweatshops, long noted in the garment industry for poor wages and working conditions, are resurging and spreading into new industries in many parts of the country, due in part to the availability of undocumented labor.[80] *Newsweek* recently reported that sweatshops are indeed on the rise.[81] Similarly, the *Los Angeles Times* has reported that undocumented workers have endured conditions which included going without wages for 88 weeks, and being paid less than the minimum wage in the construction, garment and restaurant industries.[82] There is no evidence that the undocumented who were "left behind" by IRCA are returning to their countries of origin; research, in fact, confirms that "return migration" has not increased as a result of employer sanctions.[83]

Taken together, the above evidence indicates that, at best, "the jury is still out" on the effectiveness of employer sanctions in curtailing illegal immigration. Border apprehensions may have been reduced since 1986 as a result of sanctions, though apprehension levels never fell below a point considered unacceptable in 1982, and they appear to be on the rise at present. In addition, a growing body of evidence suggests that undocumented persons continue to find work in the United States, with working conditions worse than before.

C. Discrimination Caused by Employer Sanctions

1. Overview

IRCA is a rare piece of legislation in that it actually **created** inducements for discrimination as a result of the penalties and recordkeeping requirements of employer sanctions. Hispanic and other civil rights organizations have long expressed concern that

employers, confronted with confusing documentation requirements, fear of document fraud, and the threat of sanctions fines, would be likely to "play it safe" and not hire individuals whom they perceived to be "foreign." It stands to reason that, if employers are reasonably aware and fearful of sanctions, they actually have incentive to discriminate against "foreign-looking" applicants in order to protect themselves from the threat of sanctions fines.

Due to such concerns, IRCA also contained anti-discrimination provisions, and provided for the creation of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to enforce them. In addition, the GAO was authorized under IRCA to determine, among other things, if there is a "widespread pattern of discrimination caused solely by employer sanctions." Such a determination would trigger an expedited procedure in the Congress to vote on a resolution which would "sunset" or eliminate employer sanctions. On the other hand, the anti-discrimination provisions could also be eliminated if they were found to be unnecessary.

The inclusion of the anti-discrimination and sunset provisions reflects the serious nature of enacting legislation which could prove discriminatory. According to Senator Edward Kennedy, the author of the sunset amendment on the Senate side:

> The amendment simply offers a guarantee, built into the statute, that Congress can act expeditiously to rectify any unintended discrimination. If, contrary to all the protections and intentions contained in the bill, new job discrimination does develop -- and not just a few isolated cases of discrimination, but a widespread pattern of discrimination -- then Congress can sunset employer sanctions. If such a pattern of discrimination were to develop, I can't imagine that Congress wouldn't want to act.[84]

Nearly four years later, the overwhelming evidence that employer sanctions have indeed caused widespread discrimination has put the issue squarely before Congress once again.

2. Evidence of Discrimination

A wide body of evidence from sources across the United States has found that employer sanctions have caused massive discrimination against Hispanics, Asians, and others perceived as "foreign looking" by potential employers. The sources of information cover a broad spectrum, including: surveys of employers, employees and job seekers; complaints to civil rights authorities; discriminatory hiring policies discovered in newspaper want ads; hiring audits where discriminatory behavior is observed first-hand; and numerous reports told by the victims of discrimination themselves to immigrant rights advocates. The research on the matter spans an ideological spectrum from state and local governments and civil rights advocates, to a Civil Rights Commission still dominated by Reagan appointees, to civil rights organizations. All have reached the same conclusion: employer sanctions have resulted in

substantial levels of discrimination against Hispanics, Asians, and others who seem "foreign" to their employers (See Figure 15 for a summary of the major reports on discrimination under IRCA).

FIGURE 15
SUMMARY OF RECENT RESEARCH ON DISCRIMINATION CAUSED BY EMPLOYER SANCTIONS

TITLE	METHODS USED	KEY FINDINGS
Immigration Reform: Status of Implementing Employer Sanctions After Second Year, U.S. General Accounting Office, 11/88	Review of federal agencies, review of discrimination complaints, and survey of employers	16% or 528,000 employers adopted unlawful discriminatory practices, including checking documents selectively and citizens-only policies
Workplace Discrimination Under the Immigration Reform and Control Act of 1986: A study of Impacts on New Yorkers, New York State Inter-Agency Task Force on Immigration Affairs, 11/88	Phone interviews with employers selected by random sample from unemployment insurance files, and case studies of discrimination victims	- 15% of employers know they can be fined, but don't know what to do to avoid fines - 20.5% of employers can't determine which work authorization documents are appropriate - 12.5% of employers chose not to hire individuals who could not produce documents quickly enough
Summary Findings/Recommendations of the California Fair Employment and Housing Commission, 9/89	Hearings conducted over five days in three different California cities	- Employers' fear of sanctions has resulted in a widespread pattern and practice of discrimination - INS public education materials are incomplete and confusing - Delays by the INS in issuing work authorization have resulted in termination of authorized workers
Employer Sanctions: An Update of its Impact Upon Authorized and Unauthorized Workers in the New York Metropolitan Area, Center for Immigrant's Rights, Inc., 8/89	Compilation of cases from Immigration hotline	Employer sanctions are stimulating employers to increase unfair or illegal employment practices involving both authorized and unauthorized workers
Report to the General Accounting Office: The Effects of Employer Sanctions on Workers, Coalition for Humane Immigration Rights of Los Angeles, 8/89	Questionnaires distributed to groups of immigrants, and intake results from local civil rights organizations	- Employer sanctions have caused discrimination affecting significant numbers of workers - Discriminatory behavior includes terminations, loss of seniority, selective checking of documents, and cutting wages

FIGURE 15, CONT.

TITLE	METHODS USED	KEY FINDINGS
Tarnishing the Golden Door: A Report on the Widespread Discrimination Against Immigrants and Persons Perceived as Immigrants Which has Resulted from the Immigration Reform and Control Act of 1986, City of New York Commission on Human Rights, 8/89	Public Hearings, questionnaires to victims of discrimination, hiring audit	- Employer sanctions have resulted in a widespread pattern of discrimination against immigrants and persons perceived as immigrants - Discrimination under sanctions includes termination, failure to hire, disparate terms and conditions of employment, and selective treatment - In 40% of the hiring tests, accented job seekers were treated differently than non-accented job seekers
Employment and Hiring Practices Under the Immigration Reform and Control Act of 1986: A Survey of San Francisco Businesses, Coalition for Immigrant and Refugee Rights and Services, 1989	Telephone survey from a random sample of employers	- 97% of employers surveyed regularly engage in at least one employment practice which may be discriminatory under IRCA - 12% of employers require more documents from foreign-born workers - Of employers who use I-9 forms, only 54% have received the instruction book from the INS - 79% of employers accept only documents which are laminated (three out of the 17 possible work authorization documents)
The Immigration Reform and Control Act: Assessing the Evaluation Process, U.S. Commission on Civil Rights, 9/89	Analysis of 1988 GAO report	Employer sanctions have created a pattern of discrimination against authorized workers
The Human Costs of Employer Sanctions, American Civil Liberties Union and Mexican American Legal Defense and Educational Fund, 10/89	Compilation of anecdotal evidence of discrimination under employer sanctions	- Employer sanctions have resulted in a great range of discriminatory practices - Employer sanctions have caused great hardship for authorized and unauthorized workers
Immigration in New York State: Impact and Issues, Inter Agency Task Force on Immigration Affairs, 2/90	Survey of employers and study of the education effort under employer sanctions	- 51% of employers do not know how to determine if an unfamiliar document is acceptable under the law - Approximately 10,493 employers in New York had adopted a discriminatory hiring practice since the passage of IRCA - IRCA-related changes in employment practice reduce the employment prospects of many who are legally entitled to work in the U.S.

FIGURE 15, CONT.

TITLE	METHODS USED	KEY FINDINGS
Immigration Reform: Employer Sanctions and the Question of Discrimination, U.S. General Accounting Office, 3/90	Employer survey, hiring audit, job applicant survey, review of government agencies, review of discrimination cases filed	- IRCA has created a widespread pattern of discrimination caused solely by employer sanctions - 19% or 891,000 employers have adopted unlawful discriminatory hiring practices as a result of employer sanctions - Lightly accented Hispanic job applicants were 3 times more likely to receive unfavorable treatment than similarly qualified Anglos

These findings were confirmed by the results of the third and final GAO report, which issued conclusive findings in March 1990 that employer sanctions had caused a widespread pattern of discrimination.* The GAO findings include:

- 461,000 or 10% of a population of 4.6 million employers** discriminate based on "foreign" appearance or accent, which amounts to national origin discrimination directly resulting from IRCA;

- Of the total pool of 4.6 million employers, 346,000, or 8%, applied the law's verification system only to persons who appeared or sounded "foreign," an unlawful national origin discriminatory practice;

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* Senator Alan Simpson (R-WY) recently released an internal GAO memorandum which purportedly casts doubt on the results of the report. This memo, which was part of the GAO's internal review process, raises concerns about whether the GAO can claim that the discrimination it found can be attributed solely to employer sanctions. When released to Senator Simpson, the memo was accompanied by a letter from Comptroller General Charles Bowsher explaining that, "... the final report takes into consideration all points made in the Assistant Comptroller General's memorandum....Before issuing the report, a final revised draft was reviewed again by the top people in GAO, including...[the] author of the memorandum you requested. Everyone agreed that the clarifications fully addressed the concerns initially raised and that our presentation was fair and our conclusions sound." The GAO report not has received significant criticism from any other source.

** The pool of 4.6 million employers indicates the number of employers which the GAO estimates are reflected by its survey results.

- An additional 430,000 or 9% of employers responded to IRCA by discriminating based on citizenship status, e.g. hiring only U.S. citizens;

- While discriminatory practices resulting from IRCA occur at high levels throughout the United States, they were most extensive in parts of the country with high Hispanic and Asian populations;

- Discrimination was found in a variety of industries and among employers in firms of various sizes; and

- A hiring audit showed that U.S. citizen Hispanics were three times more likely to encounter unfavorable treatment by employers than Anglos (White non-Hispanics), and that Anglos received 52% more job offers than equally qualified Hispanics.[85]

The GAO indicates that in order to interpret the results as conservatively as possible, it probably erred on the side of understating the extent of discrimination caused by IRCA.[86] The reasons for understatement of the results cited by the GAO include: assuming that employers who failed to answer the survey did not discriminate; the fact that employers would have incentive to underreport unlawful practices on a self-reporting survey; and the hiring audit's methodological design, which probably led to underestimating the extent of discrimination.

3. Complaint Data

It is no surprise to those familiar with civil rights enforcement that, despite evidence that discrimination is occurring on a large scale, the number of claims filed with the OSC and the Equal Employment Opportunity Commission (EEOC), the official enforcement agencies of the federal government, total only about 1,000 cases. Experience with civil rights laws shows that upwards of 99% of discriminatory acts are never reported. For example, the Department of Housing and Urban Development (HUD) has estimated that each year there are two million incidents of housing discrimination based on race, yet the total number of complaints alleging discrimination averages about 5,000 per year. This means that fewer than one-quarter of 1% of such discriminatory acts are ever reported.[87]

Because IRCA is a new law, and because its anti-discrimination provisions affect immigrant communities, which traditionally have not trusted even friendly federal agencies, the ratio of complaints to incidents of discrimination is likely to be even worse than for other types of discrimination. The obstacles confronting the individuals who are most likely to be harmed by IRCA-generated discrimination are strikingly documented by the City of New York Commission on Human Rights, which made 55 different presentations to approximately 1,650 individuals in community meetings and English classes designed for newly legalized immigrants. Though these presentations were made by an obviously friendly agency, which made a concerted effort to provide translations and gave repeated assurances of

confidentiality, "...temporary residents expressed fear that their immigration status would be revoked if they spoke up about discrimination."[88] Despite the fears expressed by the interviewees, the survey turned up 343 questionnaires alleging discrimination, representing 21% of the population surveyed.

Another significant obstacle to reporting discrimination claims is that discrimination, especially under IRCA, often occurs without the victim knowing that it has happened. Employers can, for example, decide not to interview or accept an employment application from someone who looks or sounds "foreign" without providing any explanation to the applicant. This behavior was documented in two audits, one by the GAO and a second by the New York Human Rights Commission. By asking pairs of testers, one with an accent, one without, to inquire by telephone about jobs listed in the newspaper, the New York Commission found that in 41% of the cases, the non-accented callers were provided opportunities that the accented callers were denied, though the calls were made within an hour of each other, and the qualifications of the callers were similar.[89]

Even when discrimination occurs, it is difficult to identify and even more difficult to substantiate. Given these constraints, the number of actual complaints filed suggests not that discrimination is not occurring, but rather that the system designed to protect against it is not functioning effectively.

4. Proposed Remedies for Discrimination Caused by Employer Sanctions

The third GAO report outlines several courses of action for Congress to consider. The first is leaving IRCA intact, in spite of the evidence that sanctions have caused widespread discrimination. The second is to repeal employer sanctions, and the third is to improve education for employers and potential discrimination victims, and possibly to combine this with increased civil rights protections and an "improved verification system." The following section assesses these alternatives in relationship to the scope of the problem and the nature of the communities affected.

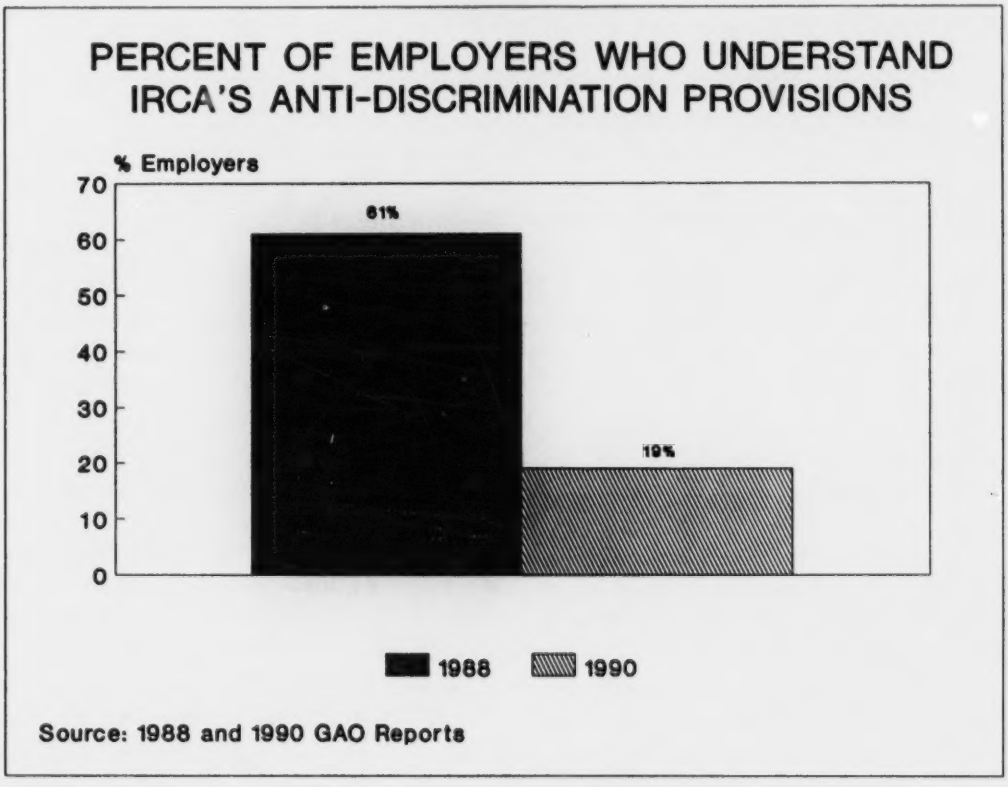
a. Increased Education

The question of discrimination caused by employer sanctions has generated a great deal of discussion about a "new type" of discrimination, a type which is caused by employer confusion rather than by any malicious intent. While the effects of "confusion discrimination" are clearly as harmful as the "old forms" of discrimination, implicit in this argument is the suggestion that the problem can be "fixed" by educating employers. Another suggested approach is educating the potential and actual victims of discrimination about the protections available to them.

The experience of the INS in educating employers about employer sanctions suggests that there are serious limitations to an approach which would make employer education the

primary vehicle for reducing or eliminating discrimination. Despite a 120% increase in INS educational efforts between 1988 and 1990, the second and third GAO reports show that only 32% of all employers have been contacted directly, and employer understanding of the law has actually decreased. The record of anti-discrimination education is even worse. Between the 1988 and 1990 GAO reports, employer understanding of the law's anti-discrimination provisions went from 61% to just 19% (See Figure 16).

FIGURE 16



Even if the education effort on IRCA's anti-discrimination provisions were equal in scope and intensity to the INS effort to educate employers about sanctions, a substantial number of employers -- up to half -- would not have gotten the message by the end of three years. An effort of greater intensity than any conducted under IRCA thus far would be necessary for employers to begin to understand IRCA's mandate that they not discriminate.

As the INS experience further shows, even after employers receive educational materials or visits, they may not comply with the law. In the anti-discrimination context, employers might respond to the INS sanctions education message by actually adopting unlawful discriminatory practices in order to avoid sanctions fines. A recent report issued by the California Fair Employment and Housing Commission found that:

> INS internal training and outreach efforts regarding IRCA's employer sanctions and discrimination provisions have been inadequate and, in certain instances, have led directly to discriminatory practices.[90]

At the moment, the INS bears the principal responsibility for all employer education under IRCA. Any INS visit, even if the officers mention IRCA's anti-discrimination provisions, is likely to leave the employer much more worried about fines for hiring undocumented workers than about anti-discrimination penalties. Thus, ongoing sanctions education efforts could actually undermine the effectiveness of any anti-discrimination education effort. Similarly, any time the INS steps up enforcement of sanctions, or publicizes a fine levied against an employer, the probability that employers will adopt discriminatory hiring practices is likely to increase.

The Office of Special Counsel has recently received an increase of $1 million in its budget for the purpose of conducting anti-discrimination outreach, the first time that substantial funds have been dedicated to anti-discrimination education. While the OSC appears to be using the funds by working with community groups which are involved with the populations affected and have experience in this type of community education, this particular effort is not on a scale which can turn back the rising tide of discrimination under employer sanctions. Given the fact that the INS, after over three years, has not been able to contact even half the affected pool of employers about sanctions, it appears unlikely that another entity just getting started will be able to perform the task more effectively. In addition, it is highly unlikely that the OSC or any other agency will receive the funding necessary for a large-scale anti-discrimination campaign. In sum, experience with employer sanctions education thus far suggests serious limitations to this approach as a method of eliminating or even reducing IRCA-generated discrimination.

b. Strengthened Anti-Discrimination Protections

Civil rights groups have long argued that enforcement of IRCA's anti-discrimination provisions would have to at least equal enforcement of employer sanctions if such provisions were to be meaningful. Congress recently enacted a package of anti-discrimination protections and enforcement measures which would cover more individuals over a wider spectrum of discriminatory behaviors, and loosen some of the restrictions on filing discrimination claims.

While such increases appear appropriate in the context of massive discrimination under employer sanctions, the experience of the Hispanic community with civil rights laws and enforcement agencies suggests that such measures at best would be only modestly effective, at least for Hispanics, who, along with Asians, are the most likely to experience discrimination caused by IRCA. For example, an internal study conducted by the EEOC in 1983 revealed that Hispanics have never enjoyed the rights theoretically afforded them under the Civil

Rights Act of 1964.[91] The Commission study found that the EEOC gave little attention to Hispanics, and that Hispanics filed complaints at much lower levels than any other major group. Resolution of the complaints was also inadequate; Hispanics had a larger proportion of complaints dismissed and closed without remedy than other groups. In addition, only 3% of EEOC litigation from 1980 to 1983 was on behalf of Hispanics, and not a single class-action suit was filed on behalf of Hispanics during that period. Thus IRCA-generated discrimination and the civil rights protections in the statute affect a community which has not benefitted fully from other civil rights laws, and has not been fully served by the civil rights enforcement system. Victims of IRCA-generated discrimination are unlikely to turn to the existing infrastructure or the newer OSC when discrimination occurs due to employer sanctions.

In addition, civil rights advocates are concerned that adopting civil rights protections in response to discrimination that is itself caused by federal legislation is an unprecedented and frightening step in civil rights law. The 1964 Civil Rights Act, for example, adopted civil rights protections in response to societal conditions which engendered discrimination. Such protections were deemed necessary to right historic wrongs and to provide incentives to change decades of discriminatory behavior. Civil rights laws have never been considered an answer to discriminatory laws; rather such laws have been reversed or declared unconstitutional. The historic standard has been that civil rights are more important than other policy objectives, such as states' rights or the right of a restaurant owner to serve only the patrons of his/her choice over a lunch counter. While anti-discrimination protections are essential while a law like employer sanctions is on the books, there are serious concerns that adopting such measures as a way to "fix" the problem represents a giant step backwards in the cause of civil rights for all Americans.

c. Improved Verification System

Another alternative proposed by the GAO and others is to limit the number of documents which prove employment eligibility and develop a "tamperproof" work authorization card. The theory behind such an identification document, long a part of the immigration reform debate, is that it will cause employers to feel more confident that employees and job applicants presenting such documents are legally authorized to work, and thus eliminate incentives to adopt discriminatory practices. The GAO suggests that such a card would reduce discrimination, though it provides limited data to support its conclusion. According to the 1990 GAO report, 78% of employers want such a verification system, and employers who discriminate are more likely to want such a system than those who do not discriminate.[92] Nevertheless, it remains unclear whether such employers would change their hiring practices as a result of implementation of a new verification system.

In addition, there is little evidence to suggest that a new ID card would reduce or eliminate many of the discriminatory practices documented in the third GAO report. For example, the GAO found that a substantial number of employers are checking documents only

of those persons who seem "foreign" to them. It is not clear that introducing a "new and improved" document would alter this practice in any way. Similarly, employers who currently screen out "foreign" looking or sounding applicants before they reach the hiring process -- a practice which the third GAO report shows is widespread -- would not be likely to change these practices, which occur before job applicants are asked to present documents.

In order for a verification system to be reasonably secure, its implementation is likely to be heavily dependent on the existing "underlying" documents. The experience of Hispanic job applicants under employer sanctions suggests that the same persons experiencing discrimination in the employment arena are likely to experience greater scrutiny in the very process of obtaining a new "secure" document. It is possible -- even likely -- that a dark-skinned card applicant who presents a U.S. birth certificate will be questioned differently, or even asked to produce additional verification, compared to an Anglo. The more secure the identification card, the greater the efforts Hispanics may have to make in order to prove legal status. This will inevitably lead to delays in obtaining cards needed to verify employment eligibility. Similarly, an Hispanic application to replace a lost card is likely to be viewed as "suspect," while the same application from an Anglo will not.

In addition, there are strong reasons to believe that the adoption of such a card could lead to abuses by law enforcement and other officials, abuses which would disproportionately affect Hispanics. Many Hispanics have already experienced the routine misuse of identification cards in border areas, where U.S. citizen Hispanics are encouraged to carry cards to prevent being mistakenly classified as an undocumented immigrant and subsequently detained or deported. Random document inspections and searches of Hispanics at border checkpoints are already common; with use of a card, such procedures might be adopted in areas away from the border. Failure to carry a card at all times could be perceived as a reason for search, detention or arrest. In short, there are strong indications that new systems to "fix" the problems caused by employer sanctions could lead to new forms of discrimination.[93]

5. Repeal of Employer Sanctions

The above remedies for discrimination all assume that employer sanctions remain in place. IRCA itself, however, contemplated the possibility that Congress might act to repeal employer sanctions if they caused a widespread pattern of discrimination. The legislative history makes it clear that Congress did not intend employer sanctions to cause discrimination, and would consider sunsetting the entire provision if discrimination occurred on a large scale.

Proponents of repealing employer sanctions express three principal arguments. First, they argue that discrimination is an unacceptable result of any federal policy. Every study which has assessed the civil rights implications of employer sanctions has concluded that they are heavily discriminatory. Proponents of repeal assert that any public policy resulting in discrimination is unjustified.

Second, the communities which are affected by discrimination under sanctions and are arguing for repeal disagree that the "remedial measures" proposed would be effective. They argue that it is unreasonable to ask large groups of Americans to wait while Congress experiments with measures that it hopes will "fix" the problem.

Third, proponents of repeal argue that in order to justify keeping employer sanctions on the books, the policy -- in fact any public policy -- should prove reasonably effective without needlessly damaging any group of Americans. By this standard, employer sanctions have the worst possible policy outcome: they have caused a civil rights disaster without achieving their objective of controlling illegal immigration.

While legislation to repeal employer sanctions has been introduced in both the House and Senate, Congress instead has only enacted legislation, which, rather than repealing employer sanctions, adopts stricter anti-discrimination requirements. Some members of Congress have also proposed a new identification system. Such legislation reflects a view that the problem can be solved, or at least reduced, through remedial measures short of outright repeal.

Those who oppose the repeal of employer sanctions argue that repealing the policy would represent a step backwards in the struggle to control U.S. borders. According to Senator Alan Simpson (R-WY):

> ...illegal immigration will increase; more illegal aliens will be exploited; and some employers will return to the practice of paying these poor people peanuts and profiting from their misery and from their labor.[94]

Senator Simpson has also questioned the conclusions of the third GAO report, disputing both the extent of discrimination and the GAO's assertion that it can be tied directly to employer sanctions.

Despite these arguments, proponents of repeal, including the National Council of La Raza, argue that repealing employer sanctions is a moral imperative on civil rights grounds alone. Congress was unwilling to say that it could accept discrimination as a result of a federal law when the debate over IRCA was raging; leaving sanctions in place amounts to a decision that discrimination is an acceptable outcome of a national policy. The repeal effort is based on the notion that no public policy, even an effective one -- and at best the "jury is still out" on the efficacy of employer sanctions -- justifies any level of discrimination against a group of Americans. Proponents of repeal assert that continued existence of the policy represents a major step backwards for a society committed to equal opportunity.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Overview

Four years after its enactment, IRCA remains unfinished business. Leaving aside the intricacies of the implementation of its various programs, an ultimate assessment of the law must be based on a comparison between the situation which led to its an enactment and the situation which exists after the law has been fully implemented.

The factors which led to concerns that the U.S. had lost control of its borders -- high apprehension rates and evidence of a large undocumented population living and being exploited in the "shadows" of U.S. society -- are as evident today as they were while the debate over IRCA was raging. Despite the best efforts of Congress, illegal immigration continues at rates matching or exceeding those which were considered unacceptable in the early 1980s. The undocumented population, which was estimated at between three and four million ten years ago, is probably the same size today, despite the legalization program. In addition, one of IRCA's principal components, employer sanctions, has created enormous levels of discrimination against Hispanic, Asian and other Americans.

If the struggle to control illegal immigration and deal with a sizeable undocumented population in the U.S. was problem enough to stimulate major legislation at that time, then four years after IRCA the U.S. faces the same problem. In the short term, the U.S. must evaluate the effectiveness of the individual elements of IRCA to determine what did and did not work. In the long term, the nation has a much bigger struggle. The entire immigration policy system must be weighed against the goals it was intended to achieve; to the extent that these goals were not realized, the nation must begin again the task of crafting effective immigration reform.

B. Conclusions

IRCA can best be assessed in terms of the positive and negative results -- intended and unintended -- of its two major components, legalization and employer sanctions.

1. Legalization

While the legalization program will ultimately lead to status changes for nearly 1.7 million previously undocumented persons, the first stage of legalization failed to maximize participation from the pool of eligible applicants. Several implementation problems during the first stage prevented the optimum number of eligible applicants from coming forward to be legalized. The most significant implementation problems included the following:

- ***Confusion over seemingly constant changes in the legalization regulations limited the number of applicants.*** Over 15 major changes in the regulations during the year-long application period broadened the pool of individuals who were theoretically eligible for legalization. However, these changes were not adequately publicized; there are over 100,000 known cases of individuals who were probably eligible for legalization but did not apply because of poor outreach about changes in the regulations or outright misinformation.

- ***A mismanaged public information program failed to maximize the total number of applicants.*** The public information campaign focused on mass media during the opening months of legalization, to the exclusion of community-based approaches. Only after severe criticism did the campaign switch its focus to the more effective community-based approach, too late to achieve maximum impact.

The legalization program is far from complete; large numbers of newly legalized persons could lose their status because of implementation problems in the second stage of legalization. Many legalization applicants may not fulfill their requirements in time to file for permanent residence, and potentially many more may be ignorant that there is a second stage process which they must undergo in order to retain their legal status and become permanent residents. Major problems with the second stage include the following:

- ***The availability of ESL/civics classes is threatened both by bureaucratic problems and by "raids" on the funding appropriated by Congress for such programs.*** Establishment of ESL/civics classes has been seriously hampered by bureaucratic problems at the national and state levels. Existing classes are jeopardized by cuts in SLIAG funds. Already $500 million has been "borrowed" from the SLIAG pot, and further cuts could be imminent. These problems jeopardize not only the ability of applicants to qualify for the second stage of legalization; they threaten the ability of the newly legalized to become full participants in U.S. society.

- ***Many second stage applicants had missed their application deadlines because of confusion and poor outreach before Congress moved to extend the deadline.*** As of October 1, 1990 over 35,000 applicants had already missed their initial second stage filing deadlines. Unless a great effort is made to correct the outreach problems thus far, large numbers of people could lose their status by the end of the second stage.

While legalization benefitted many individuals, the benefits did not always apply to their families; many of the families of newly legalized immigrants continue to face separation by deportation. Despite an INS "family fairness" policy, many spouses and children of newly legalized immigrants continue to be pursued by the INS. Children as young as three years old have been placed under deportation proceedings. Even families who

are eligible for protection have been separated by the INS. This violates one of the basic underlying principles of U.S. immigration law and policy, family unification.

As a result of these problems, the overall goal of legalization -- to eliminate the exploitable subclass of undocumented U.S. residents -- has not been achieved. Even if the maximum possible number of newly legalized persons safely reaches permanent residence status, the U.S. will be left with a large undocumented population which was not able to legalize, or which arrived after IRCA was enacted. NCLR estimates that the undocumented population today, three to four million persons, equals that of the early 1980s, when the debate over IRCA took place. Conditions for these people may be worse than at the beginning of the decade, when the arguments that legalization was not only humane, but in the national interest, were framed. In the wake of this "one-time-only" program, the nation appears to be left with at least as many undocumented people as when it first considered these proposals, and the political likelihood of further initiatives to address the problem in the foreseeable future is drastically lower due to IRCA.

2. Employer Sanctions

Employer sanctions appear unlikely ever to achieve their intended purpose. Data on the effectiveness of employer sanctions thus far suggest that the policy has had at best a limited short-term effect in controlling illegal immigration at the border. Moreover, several problems indicate that in the long term, the policy is likely to be ineffective in controlling undocumented immigration:

- ***A substantial education and enforcement effort by the INS has not had dramatic effects.*** Despite an education effort which has more than doubled in intensity, employers understand the law less in 1990 than they did in 1988. In addition, enforcement of employer sanctions has been uneven and inconsistent.

- ***Despite a decline in border apprehensions immediately after enactment of IRCA, border crossings are on the rise.*** The post-IRCA effect on border apprehensions never reduced activity at the border below its levels in 1982, when the debate over IRCA was raging. Border apprehensions are rising rapidly, matching peak 1986 levels in some areas.

- ***Labor market studies show that IRCA has had no significant effect on the job market for undocumented workers.*** There is growing evidence that undocumented workers continue to find jobs, with worse wages and working conditions than before enactment of the law. Because of employer sanctions, exploited workers are now less likely to report abuse than they were prior to IRCA.

Employer sanctions are inherently discriminatory. A number of studies, culminating in the 1990 GAO report, indicate that large numbers of employers have adopted discriminatory hiring practices as a direct result of the law. IRCA-generated discrimination appears to be the most concentrated in areas of the U.S. with the largest concentrations of Hispanics and Asians, amounting to a civil rights disaster. Even if sanctions were working, the history and values of the United States dictate that no public policy objective merits discrimination against any group of Americans.

C. Recommendations

Maximizing the positive impact and minimizing the negative results of IRCA requires immediate policy and program changes. Given IRCA's extreme discriminatory impact, action is a national imperative.

The National Council of La Raza recommends the following specific action by Congress, the Administration, and the INS.

1. Legalization

The U.S. should complete the legalization program. Legalization will not be finished until the second stage has been completed. Congress, the INS, and immigrant service agencies have an obligation to maximize the final number of persons who become permanent residents. Congress should immediately enact several modifications in current policy to improve the likelihood that the second stage of legalization will not prevent temporary residents from attaining permanent residence status because of poor implementation:

- ***Implement an immediate outreach campaign*** to prevent legalized immigrants from missing their second stage application deadline;

- ***Allow judges to order extensions of the stage one application period*** for those applicants who were misinformed of changes in the regulations and who have become part of class-action lawsuits;

- ***Leave SLIAG funds in place*** to allow ESL/civics classes to keep their doors open. Such programs are vital to helping applicants with their second-stage requirements and in providing long term services that help the newly legalized to participate fully in U.S. society;

- ***Ensure that the "family unity" program is implemented as generously as possible*** to prevent the deportation of the spouses and children of legalized immigrants while they wait in line for permanent resident status.

Congress must adopt policies to eliminate the undocumented subclass living within the United States. The existence of an undocumented population of three to four million, under conditions which are probably worse than they were prior to IRCA, is as harmful to U.S. society today as it was when IRCA was first framed. Congress must therefore consider mechanisms for adjusting the status of undocumented residents of the U.S. by a means more effective than the recent legalization program. Such means could include a program which legalizes individuals living within the U.S. when IRCA was passed, or a second legalization program with a cutoff date that falls within one year of enactment.

2. Employer Sanctions

Congress should repeal employer sanctions. No public policy objective justifies creating discrimination against U.S. citizens and others lawfully authorized to work in the United States. Moreover, in addition to the social costs of discrimination, sanctions have not proven effective. Congress therefore has a moral obligation to repeal employer sanctions.

Pending repeal of the policy, Congress and the Administration must modify employer sanctions. Until the policy is repealed Congress should enact legislation which minimizes the discriminatory effects of employer sanctions. Such legislation should include:

- ***Monitoring recently adopted anti-discrimination protections, and attaching them to a "sunset" of employer sanctions.*** Congress recently acted to extend the civil rights protections contained within IRCA, but did not commit itself to monitoring these provisions. Congress should test the effectiveness of these protections; if the results of such tests show that anti-discrimination measures have failed to eliminate IRCA-generated discrimination, such results should trigger an automatic sunset of employer sanctions. A "true" sunset provision increases the incentive for Congress and the Administration to enforce IRCA-related civil rights protections vigorously, and guarantees that the issue be revisited if such measures do not work.

- ***Limit coverage of employer sanctions.*** As the second GAO report and other evidence shows, the requirement that virtually all U.S. employers verify the documents of their employees is responsible for a large portion of the discrimination created by IRCA. By reducing the numbers or types of employers required to verify documents and simplifying the procedures, Congress could reduce the extent to which discrimination is occurring under sanctions. Arguably, directing enforcement resources toward a more limited range of employers could improve the quality and efficiency of enforcement efforts against violators of employer sanctions.

Congress should replace employer sanctions with policies which would be more likely to be effective at controlling illegal immigration without infringing on the civil rights of Hispanic and other Americans. The repeal of employer sanctions should be accompanied by a more comprehensive and balanced policy to control illegal immigration. Such a policy should include:

- ***Increased border enforcement and accountability of the Border Patrol.*** The most effective way to prevent illegal immigration at the border is to find humane means of preventing illegal entry. The Border Patrol must be increased, and provided with training to prevent human and civil rights abuses at the border. Increases of the Border Patrol should be accompanied with monitoring programs to ensure that abuses do not occur.

- ***Increased labor law enforcement.*** It is clear that many employers who hire undocumented workers despite employer sanctions are also violating labor laws, subjecting such workers to substandard wages and working conditions. Increased enforcement of these existing laws would allow the U.S. to use its resources more efficiently to eliminate hiring and abuse of undocumented workers without the discriminatory effects of employer sanctions.

- ***Increased penalties for smuggling and harboring aliens for profit.*** A serious effort to punish those who profit by smuggling undocumented workers could significantly reduce illegal immigration.

Congress should reject proposals to develop any type of identity card. It is not clear that any new type of identification system, whether it be a new card or an "improved" social security card, would reduce discrimination. Implementation of a new form of identification may cause more problems than it resolves. Congress should not consider expensive, cumbersome new policies to remedy the negative effects of a federal law. Discrimination under IRCA should be addressed at its source -- the structure and implementation of employer sanctions.

Immigration policy, like any other U.S. policy, should reflect the values of the nation and enhance them. Because of its heritage as a nation of immigrants and their descendants, the U.S. faces the difficult challenge of controlling illegal immigration -- for the good of the nation and the immigrants themselves -- without infringing on the rights of Americans. IRCA, like many previous U.S. immigration policies, has failed to live up to this challenge, and must be reconsidered. Four years after the enactment of this sweeping legislation, the nation faces virtually the same challenge it faced when the difficult debate over this law began. The moment has arrived to rid ourselves of the notion that IRCA has "fixed" the problems of illegal immigration, and turn again to the difficult business of developing immigration policy which is both effective and humane.

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